

years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation."

In the present case the entry in the papers has always continued as in the past and the attempt of the respondents to have an under-proprietary *khwat* has failed. We are of opinion that the claim for a declaration was not barred by time.

On our findings on points Nos. 3 and 4 the plaintiff's suit fails and must be dismissed. We, therefore, uphold the decree passed by the court below and dismiss the appeal with costs.

1939  
RAJA  
SHERI  
AMAR  
KRISHNA  
NARAIN  
SINGH  
v.  
WARIS  
HUSAIN

*Ziaul Hasan  
and  
Radha  
Krishna,  
JJ.*

*Appeal dismissed.*

## APPELLATE CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice Radha Krishna  
Srivastava*

KANDHAIYA BUX SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) v. THAKURAIN SUKHRAJ KUAR AND OTHERS (DEFENDANTS-RESPONDENTS)\*

1939  
August, 16

*Decree against father—Execution proceedings—Sons not made parties even to execution proceedings—Share of sons, if bound by sale—Landlord and tenant—"Bila tasfia" entry in revenue records, meaning of.*

Where a decree is against the father the shares of two of his sons cannot be deemed to have been exempted from sale even if they were not made parties to the execution proceedings and only the name of one of the sons was brought on the record. *Kaniz Abbas v. Bala Din* (1), *Babu Lal v. Sukhrani* (2), and *Malkharjun v. Narhari* (3), relied on.

The entry in the revenue records that a person is holding certain land *bila tasfia* can at best show that he is holding the land as tenant and not as under-proprietor.

Messrs. *M. Wasim* and *Bhagwati Nath Srivastava*, for the appellants.

Mr. *P. N. Chaudhari*, for respondent No. 1.

\*First Civil Appeal No. 103 of 1936, against the order of Babu Avadh Behari Lal, Sub-Judge of Sultanpur, dated the 23rd May, 1936.

(1) (1925) 2 O.W.N., 34.

(2) (1926) 3 O.W.N., 771.

(3) (1900) I.L.R., 25 Bom., 337

1939

KANDHAIYA

BUX

SINGH

v.

THAKURAIN

SUKHRAJ

KUAR

ZIAUL and RADHA KRISHNA, JJ.:—This is a plaintiff's first appeal against a decree of the learned Civil Judge of Sultanpur dismissing their claim for possession of certain areas of land of village Nanemau.

It appears from the judgment (Exhibits A-2 and A-3) of the Settlement Court that the village of Nanemau comprised three *thoks*, namely Thok Lachmi Kant, Thok Teja Singh and Thok Sanghail Rai. The co-sharers of each of these three *thoks* brought a suit for a declaration of their *pukhtadari* rights in five *biswas* against Sitla Bakhsh Singh, the then taluqdar. The Settlement Court said:

"Although no claim for *pukhtadari* can be brought for such land as is given for maintenance but the defendants have no objection if the land to the extent in the possession of the plaintiffs be declared to be the under-proprietary holding of the plaintiffs and proper *jama* be assessed."

Accordingly on the 31st July, 1869, a decree was passed in favour of the plaintiffs to the suit in the following terms:

		Rent	
		Rs.	a. p.
1. In favour of the co-sharers of Thok Lachmi Kant excepting patti Anup which was in the possession of the taluqdar.	219 bighas, 12 biswas representing 3 biswas, 15 biswansis, 12 kach-wansis.	369	2 3
2. In favour of the co-sharers of Thok Tej Singh.	285 bighas, 18 biswas representing 4 biswas, 18 biswansis, 8 kach-wansis.	480	8 9
3. In favour of co-sharers of Thok Sanghail Rai.	191 bighas, 13 biswas representing 3 biswas, 6 biswansis.	322	5 0
4. Shamilat .. ..	17 bighas, 14 biswas.		
Total .. ..	17 bighas, 17 biswas (shares 12 biswas).	1,172	0 0

The decree in respect of Thok Lachmi Kant, with which we are concerned in this appeal, was in favour of Dirgaj Singh and Balwanta Singh and that *thok* was divided into the following five *pattis*:

- (1) Patti Balwant Singh,
- (2) Patti Dirgaj Singh,
- (3) Patti Shankar Singh,
- (4) Patti Murat Singh,
- (5) Patti Hanuman Singh.

On the 26th November, 1880, the taluqdar obtained a decree for arrears of rent (Exhibit A-5) for 1285 and 1286 Fasil against the under-proprietors to the extent of Rs.1,353-6-11 and costs. So far as Thok Lachmi Kant was concerned the amount decreed against Balwanta Singh was Rs.693-4-9.

1939

KANDHAIYA  
BUN  
SINGH  
v.  
THAKURAIN  
SUKHRAJ  
KUAR

In 1882 the taluqdar sued the under-proprietors again for arrears of rent in respect of 1287 to 1289 Fasli (*vide* Exhibit A-6) and on the 6th November, 1882 a decree (Exhibit A-7) was passed for Rs.1,772-7 together with Rs.125-12 costs. The co-sharers of Thok Lachmi Kant were liable under this decree to the extent of Rs.1,176-12-9 and Rs.82-15 costs.

Ziaul Hasar  
and  
Radha  
Krishna.  
J.J.

On the 9th July, 1883, Shitab Rai, general agent of the taluqdar, put in an application for execution (Exhibit 3) of the decree of the 6th November, 1882, in which he prayed that the decretal amount be realized by sale of the *pukhtadari haqiat* of the judgment-debtors. The previous decree of 1880 also appears to have been put in execution though the application for execution is not on the record, as the order (Exhibit A-8) dated the 30th January, 1884, shows that the total amount due from the judgment debtors was Rs.3,202-1-9 and it refers to "execution of decree cases." Accordingly a sale statement Exhibit A-16, was drawn up on the 14th May, 1884, proposing to sell 358 bighas 16 biswas "held in sub-settlement" equivalent to 6 biswas 6 biswansis 14 kachwansis share of the defendants. On the 26th June, 1884, a notice of sale, Exhibit 18, was issued under sections 136 and 137 of Act XVII of 1876 in which the amount of the share of the judgment-debtors proposed to be sold was given as 6 biswas 6 biswansis, 14 kachwanis and the area of the land was given as 461 bighas, 17 biswas (358 bighas, 16 biswas cultivated and 103 bighas 1 biswa uncultivated) with other details of the property regarding encumbrances etc.

The sale was held on the 12th August, 1884, and a sale certificate (Exhibit A-32) issued to the taluqdar who

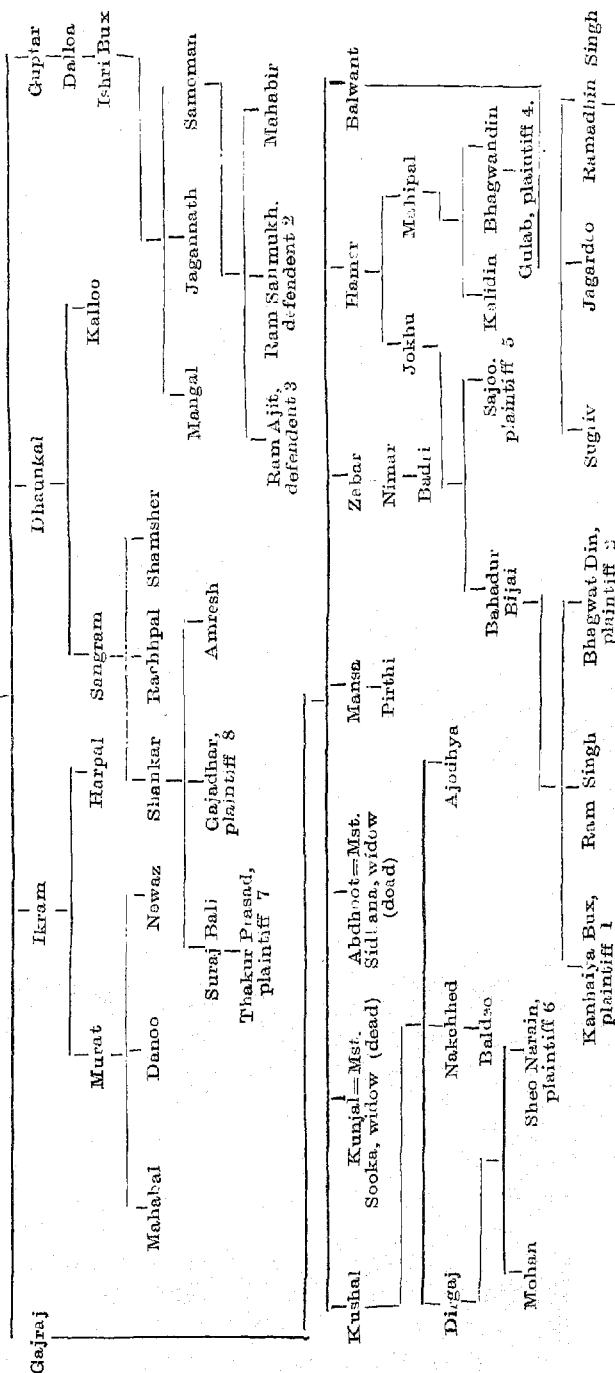
1939  
 KANDHATYA  
 BUX  
 SINGH  
 v.  
 THAKURAIN  
 SUKURAJ  
 KUAR

purchased the property through an agent. In this certificate, which is dated the 23rd July, 1885, the amount of the share sold is the same as that given in the statement and notice of sale but the area is given as 744 bighas 10 biswas comprising 373 bighas 8 biswas 10 biswansis cultivated and 371 bighas, 1 biswa, 10 biswansis uncultivated land.

*Ziaul Hasan*  
 and  
*Radha*  
*Krishna,*  
*JJ.*

Now, the plaintiff's case is that by this sale the shares of some only of the co-sharers of Thok Lachmi Nant were sold but not of others who were no parties to the decree for arrears of rent. These co-sharers were Sugriva Singh and Jagardeo Singh, sons of Balwanta Singh, Mst. Sidhana, Mst. Sukha, Baldeo Singh, Rachhpal Singh, Harpal Singh and Jagannath Singh. The plaintiffs allege that they are the representatives-in-interest of these co-sharers according to the following pedigree and that therefore they are entitled to their shares as detailed in List B of the plaint and to 44 bighas 9 biswas of *sir* land of these co-sharers detailed in List C attached to the plaint:

## TURANG SIAH



1939

KANDHAIYA  
BUX  
SINGH  
v.  
THAKURAIN  
SUKHRAJ  
KUAR

Ziaul Hasan  
and  
Radha  
Krishna,  
JJ.

1939

KANDHAIYA

BOY

SINGH

v.

THAKURAIN

SUKHRAJ

KUR

Ziaul Hasan

and

Radha

Krishna,

Jl.

The plaintiffs claim to be in possession of the land in suit but allege that they have come to know recently that their names have been wrongly removed from the *khewat* on account of which the defendant No. 1, who is the daughter-in-law and successor of the previous taluqdar, Sitla Bakhsh Singh, wants to dispossess them. They pray (a) that a declaratory decree be passed, that the plaintiffs are owners of the property entered in List B as *pukhtadars* and of the land entered in List C as *sir* and (b) that if any portion of the property in suit be deemed not to be in their possession, then possession may also be awarded to them.

The suit was contested by defendant No. 1, on whose pleas the following issues were framed :

(1) Were persons mentioned in list B attached to the plaint, also co-sharers in Thok Lachmi Kant, at time of decree and sale, as alleged? If so, what was the extent of their share?

(2) Was their share also sold either under decree of 1880 or 1882 on the principle of joint liability as alleged by defendant 1?

(3) Was the name of Mst. Sukha and Sidhana entered merely for their consolation as alleged by defendant no. 1. Were these ladies absolute owners of their share as contended by plaintiffs? If so, were they alive at the time of sale, and to what effect?

(4) Are plaintiffs heirs of the persons mentioned in list B attached to the plaint?

(5) Were the co-sharers of Thok Lachmi Kant also decree-holders of non-agricultural land as contended by plaintiffs? If so, was that non-agricultural land sold partly or wholly?

(6) Has defendant no. 1 acquired title to the exempted share (if any) by adverse possession as alleged?

(7) Is suit within limitation?

(8) Is suit barred by estoppel?

(9) Has defendant no. 1 redeemed any prior mortgages? If so, are plaintiffs bound to pay proportionate share? If so what amount is payable by plaintiffs? Is it a condition precedent to suit for possession being decreed?

(10) Is suit undervalued? Is the court-fee paid sufficient?

(11) Has this court no jurisdiction to try the suit as pleaded by defendant No. 1?

1939

(12) To what relief and in respect of what property and on what terms are plaintiffs or any of them entitled?

KANDHAITYA  
BUX  
SINGH  
v.  
THAKURAIN  
SUKHRAJ  
KUAR

The first issue was decided in the negative and the second in the affirmative. On the third issue it was held that Msts. Sukha and Sidhana were not absolute owners of the shares recorded in their names but that their names were entered in the *khewat* merely for their consolation. The fourth issue was decided in favour of the plaintiffs. On the fifth issue it was held that non-agricultural land of Thok Lachhmi Kant was also sold. Issues 6 and 7 were decided in favour of the contesting defendants and against the plaintiffs. The suit was dismissed owing to the findings on issues 1, 2, 3, 5, 6 and 7.

Ziaul Hasan  
and  
Radha  
Krishna,  
JJ.

The main question for decision before us is whether the entire Thok Lachhmi Kant was sold in execution of the decrees in favour of the taluqdar or whether the shares of the co-sharers mentioned in List B of the plaint were exempted from the sale. As noted above, the plaintiffs in List B of their plaint have mentioned the names of the following eight co-sharers as those whose shares according to them were exempted, namely, Sugriv Singh, Jagardeo Singh, Mst. Sidhana, Mst. Sukha, Baldeo Singh, Rachhpal Singh, Harpal Singh and Jagannath Singh. So far as the last two are concerned, it was conceded that as their names did not appear in the *khewat* in Pattis Murat Singh and Hanoman Singh respectively, it cannot be said that they had any shares which were exempted at the time of the sale. The plea was not pressed with regard to Baldeo Singh and Rachhpal Singh also about whom there is no evidence, as the learned Judge of the court below has pointed out, that they were living at the time of the sale. The learned Counsel however laid stress on the cases of the other four and contended that they not being parties to the decree or to the execution proceedings, the sale could not be deemed to affect their shares. So far

1939

KANDHAIYA  
BUX  
SINGH  
v.  
THAKURAIN  
SUKHRAJ  
KUAR

Ziaul Hasan  
and  
Radha  
Krishna,  
J.J.

as Jagardeo Singh and Sugriv Singh are concerned the learned Counsel relies on the entries in Exhibit 2 the "karkhas" *khewat* prepared in 1884 which shows that on the death of Balwanta Singh which occurred probably towards the end of 1883, the names of his three sons Ramadhin Singh, Jagardeo Singh and Sugriv Singh were mutated in respect of his share and which also shows that the name of the Deputy Commissioner as Manager of Kham Tahsil of the Nanemau ilaqa was ordered to be entered in place of Ramadhin Singh by orders, dated the 9th July, 1890, and 1st December, 1890. We think, however, that as the decree was against Balwanta Singh, the shares of two of his sons cannot be deemed to have been exempted from sale even if they were not made parties to the execution proceedings and only the name of one of the sons was brought on the record. In *Kaniz Abbas v. Bala Din* (1) it was held that when a court issues notices to a person supposed to be the only legal representative of the deceased defendant or judgment-debtor and holds, that service is sufficient, the decree passed and the execution thereof will be considered sufficient to cover the entire estate including the shares of those heirs of the deceased defendant or judgment-debtor who had not been brought on the record and who had not received notice. Similarly in *Babu Lal v. Sukhrani* (2) a Bench of this Court following the decision of the Judicial Committee reported in *Malkarjun v. Narhari* (3) held that the representatives of a judgment-debtor are bound by attachment and sale held in execution of a decree although they may not have been formally made as parties or wrong persons may have been parties to the decree. There is thus no force in the contention that the shares of Jagardeo Singh and Sugriv Singh were exempted from the sale of the 12th August, 1884.

As regards Mst. Sukha and Mst. Sidhana, it will be seen from the pedigree that they were the widows of

(1) (1925) 2 O.W.N., 84.

(2) (1926) 3 O.W.N., 771.

(3) (1900) I.L.R., 25 Bom., 337.



Kunjai Singh and Abdhoot Singh respectively, both of whom were brothers of Balwant Singh. The learned Judge of the court below has given good reasons for holding that the husbands of these ladies were members of a joint family with Balwant Singh and that their shares devolved by survivorship on Balwant Singh, who was a party to the decree. Moreover, there is no evidence to show when these two ladies died and there is thus no material on the record on which it can be held that the plaintiffs are entitled to succeed to the property recorded in the names of these ladies even if they be held to be widows of separated Hindus. The plaintiffs have thus failed to prove their title to any of the shares claimed by them. On the other hand there is satisfactory documentary evidence to show that the entire Thok Lachhmi Kant was put to sale and sold in 1884. We have already noted from Exhibit A-3 that the shares represented by the three *thoks* were as follows:

Thok Lachhmi Kant ..	..	3 biswas 15 biswansis 12 kachwansis
Thok Tej Singh ..	..	4 biswas 18 biswansis 8 kachwansis.
Thok Sanghail ..	..	3 biswas 6 biswansis.

---

Total .. 12 biswas.

The total of the cultivated area of the village is given in the *fard biswat* Exhibit A-181 as 1,191 bighas 14 biswas. Therefore, calculating the proportionate cultivated area of the three *thoks* it comes to the following:

Thok Lachhmi Kant ..	..	..	219 bighas 12 biswas.
Thok Tej Singh ..	..	..	285 bighas 18 biswas.
Thok Sanghail ..	..	..	191 bighas 13 biswas.

---

Total .. 697 bighas 3 biswas.

The same is the total cultivated area of the three *thoks* as given in Exhibit 1, the *khewat* of the first settlement, though there is a slight difference in the area of each *thok*, which is as follow:

Thok Lachhmi Kant ..	..	..	214 bighas 9 biswas.
Thok Tej Singh ..	..	..	289 bighas 4 biswas.
Thok Sanghail ..	..	..	193 bighas 7 biswas.

1939

KANDHAIYA  
BUX  
SINGH  
v.  
THAKURAIN  
SUKHRAJ  
KUAR

Ziaul Hasan  
and  
Radha  
Krishna,  
JJ.

1939

KANDHAIYA

BUX

SINGH

v.

THAKURAIN

SUKHRAJ

KUAR

The total areas of the three *thoks* as given in the settlement *khewat*, Exhibit 1, are as follows:

Thok Lachhmi Kant ..	214 bighas 9 biswas cultivated.
Ditto ..	87 bighas 1 biswas uncultivated
Total ..	281 bighas 10 biswas.

The area of patti Sheombar of Thok Tej which was the only *patti* which was sold is as follows:

Ziaul Hasan

and

Radha

Krishna,

JJ.

33 bighas 16 biswas cultivated.
4 bighas 16 biswas uncultivated.

Total .. 38 bighas 12 biswas.

In Thok Sanghail the shares of the under-proprietors of five *pattis* were sold, namely, Patti Jugraj, Patti Sangram, Patti Sheobalak, Patti Muneshwar and Patti Zalim.

The areas of these *pattis* according to Exhibit 1 are as follows:

Patti Jugraj ..	{ 9 bighas 6 biswas cultivated. Nil. uncultivated.
Patti Sangram ..	{ 9 bighas 7 biswas cultivated. 4 biswas uncultivated.
Patti Sheo Balak ..	{ 9 bighas 4 biswas cultivated. 1 biswas uncultivated.
Patti Muneshwar ..	{ 9 bighas 5 biswas cultivated. 2 biswas uncultivated.
Patti Zalim ..	{ 23 bighas 10 biswas cultivated. 7 biswas uncultivated.

To these we must add the share of Zalim in the *patti* which is *shamilat* of his and Suphal's *patti*. This according to the rule of three comes to, 4 bighas, 14 biswas cultivated and 3 bighas 4 biswas uncultivated. Again we must take the proportionate area appertaining to the five *pattis* sold out of the *patti* which is *shamilat* of all the eight *pattis*. That comes to 45 bighas cultivated and 4 bighas 16 biswas uncultivated. There is again a *shamilat patti* of all the owners of the *thok* but as in this *patti* there are only 18 biswas of cultivated land, we may leave out of account the proportionate share of the five *pattis* in these 18 biswas but out of the uncultivated land of this *shamilat patti*, the proportionate share comes to 22 bighas 10 biswas. The total area out of Thok Sanghail comes, therefore, to 110 bighas 11 biswas cultivated and 31 bighas 4 biswas uncultivated land. The total cultivated area of the three

*thoks* that was sold thus comes to 358 bighas 16 biswas which was what was put up for sale as shown by Exhibit A-16, the sale statement. It is thus clear that the entire cultivated area of Thok Lachhmi Kant was sold.

Coming now to the uncultivated land, the figures as taken from Exhibit 1 are as follows:

Thok Lachhmi Kant .. ..	67 bighas 1 biswa	Ziaul Hasan and Radha Krishna, JJ.
Thok Sanghail .. ..	31 bighas 4 biswa.	
Thok Tej .. ..	4 bighas 16 biswas.	
Total .. ..	103 bighas 1 biswa.	

As the total uncultivated *shamilat* land of the 12 biswas according to Exhibit 1 is 503 bighas 13 biswas the proportionate share of this *shamilat* uncultivated land appertaining to the 6 biswas 6 biswansis 14 kachwansis sold comes to 275 bighas 18 biswas. Therefore, the entire area sold is as follows—

358 bighas 16 biswas cultivated.  
103 bighas 1 biswa uncultivated.  
275 bighas 18 biswas uncultivated *shamilat*.

Total .. 737 bighas, 15 biswas.

This is almost the same figure as given in the sale certificate and the figures given above also explain the increase in the uncultivated area over the figure given in the sale statement.

From the above it is clear that the entire cultivated and uncultivated area of Thok Lachhmi Kant was sold.

Before leaving this point we may refer to a document which, though of little evidentiary value, in our opinion, was laid great stress on by the learned Counsel for the appellants. It is Exhibit 30, the report of a revenue official, dated the 5th April, 1890, made about three months before the order for mutation in favour of the Deputy Commissioner was passed. It gives the total area belonging to the persons whose shares were sold as only 128 bighas 13 biswas 18 biswansis and says that the shares of Jagardeo Singh, Mst. Sukha, Mst. Sidhana and Rachhpal Singh were exempted from sale. No reliance can, in our opinion, be placed on this report in support of the plaintiffs' claim. In the first place,

1939

KANDHAIA  
BUX  
SINGH  
v.  
THAKURAIN  
SUKHRAJ  
KUAR

1939

KANDHAIA  
BUX  
SINGH  
v.  
THAKURAIN  
SUKHRAJ  
KUAR

Ziaul Hasan  
and  
Radha  
Krishna,  
JJ.

the report does not give the name or even the designation of the official who made it. In the second, it seems to proceed entirely on and even goes further in favour of the co-sharers whose shares were sold than the *kharkhas khewat* (Exhibit 2) referred to above. In the third, the report was not accepted even by the Mutation Court which by its order (Exhibit A-35), dated the 25th July, 1890 ordered mutation to be made in favour of the Deputy Commissioner in respect of 6 biswas 6 biswansis 14 kachwansis "having an area of 744 bighas 10 biswas". This report, therefore, cannot prove the claim of the plaintiffs.

We now come to the question of limitation. Although in view of the fact that the plaintiffs have totally failed on the question of title it is not necessary to go into the question of limitation, yet we may say that the plaintiffs have also failed to prove that they were in possession of the land in suit within twelve years before suit. They rely mainly on the fact that in respect of some plots of land they are recorded as holding them *bila tasfiya* but these entries can at best show that they are holding the plots as tenants and not as under-proprietors. On the other hand there is ample evidence to prove that the defendant No. 1, and her predecessors-in-interest have been in possession adversely to the plaintiffs-appellants for a large number of years. Exhibit A-35, the *khewat* of the second settlement, shows that though in the *khewat* of the first settlement Exhibit 1 the names of some co-sharers of Thok Lachhmi Kant were allowed to remain by some mistake, this mistake was rectified at the time of the second settlement and soon after the order for mutation was passed in favour of the Deputy Commissioner. We may also mention that mutation in favour of the Deputy Commissioner in respect of 744 bighas 10 biswas was ordered in spite of the objections brought by several co-sharers to the effect that their shares were not sold. The taluqdar and his representative-in-interest have

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.

1939

KANDHAIYA

BUX  
SINGH

v.

THAKURAI

SUKHRAJ  
KUAR

*Appeal dismissed.*

## APPELLATE CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice*

*A. H. deB. Hamilton*

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

1939

August 31

*Alluvial 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 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.

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 always 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.