APPELLATE CIVIL.

Before Tek Chand and Coldstream JJ.

1930

Nov. 10.

KHUDA BAKHSH AND OTHERS (DEFENDANTS) Appellants

versus

VIR BHAN AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 2028 of 1924.

Alluvion and Diluvion—Rights of adna maliks—*on re-appearance of submerged land—village Bet Nurwala*, Tahsil *Alipur, District Muzaffargarh*—Wajib-ul-arz—Haq Jhuri.

Certain lands in the village of Bet Nurwala in Alipur *Tahsil*, District Muzaffargarh, of which defendant-appellants were superior proprietors (*ala maliks*) and plaintiffs-respondents were originally recorded as *adna maliks*, became submerged in the Chenab river and the question for decision was whether on their re-appearance the *adna maliks* had the right to be re-instated on payment of customary due, known as *haq jhuri*, to the *ala maliks*, or whether it was open to the *ala maliks* either to re-instate the *adna maliks* on payment of this due or to deal with the lands as they pleased without regard to the previous status of the *adna maliks*.

Held, that in respect of both the *pattis* of the village, on the true interpretation of the entry in the *Wajib-ul-arz* relating to *Patti* Kathpalwali, if an area owned by *adna* proprietors is washed away and then re-appears, it is held to be the property of the *ala* proprietors, but the *adna* proprietors have a right to be re-instated if they are prepared to pay *jhuri*. If the *ala* proprietors do not intentionally accept the *jhuri* dues offered, then the *adna* proprietors are not entitled to take possession of the land until fair *jhuri* dues fixed with regard to the quality of the land are paid.

Ahmad Shah v. *Khuda Bakhsh* (1), and Civil Appeal No. 1208 of 1907 (unpublished), relied upon.

Sahib Din v. *Ilam Din* (2), and *Sardar Muhammad Chiragh Khan* v. *Amir Chand* (3), distinguished.

(1) 83 P. R. 1903. (2) 15 P. R. 1904.
(3) 18 P. R. 1914.

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Second appeal from the decree of E. R. Anderson, Esquire, District Judge, Multan, dated the 16th April 1924, affirming that of Lala *Ghanshyam Das, Senior Subordinate Judge, Muzaffargarh, dated the 22nd November 1923, declaring that the plaintiffs do not forfeit their right to the land in suit, but that they shall be liable to pay* jhuri. etc., etc.

JAGAN NATH AGGARWAL and HAR GOPAL, for Appellants.

MEHR CHAND MAHAJAN and J. G. SETHI for Respondents.

COLDSTREAM J.—This judgment will dispose of the two appeals Nos. 2028 and 2991 of 1924, the matter for decision in both of which is the same. The circumstances giving rise to the appeals are as follows :— COLDSTREAM J.

Certain lands in the village of Bet Nurwala in Alipur *tahsil* of Muzaffargarh district of which the defendants appellants are superior proprietors (*ala maliks*) and the plaintiffs-respondents were originally recorded as *adna maliks*, became submerged in the Chenab river and the question for decision in both cases is whether on their re-appearance the *adna maliks* have the right to be reinstated on payment of customary due known as *haq jhuri* to the *ala maliks* or whether it is open to the *ala maliks* either to reinstate the *adna maliks* on payment of this due or to deal with the lands as they please without regard to the previous status of the *adna maliks*. In the suit No. 19 of 1923 from which the appeal No. 2028 arises the lands concerned had not emerged from the river when the suit was instituted in January 1923 and the plaintiffs sued for a declaration to the effect that they had not lost their rights as *adna maliks*, or as mort-

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gagees of *adna milkiyat* rights, in these lands by reason of the lands having been submerged. The lands to which the other appeal No. 2991 relates had emerged when the suit relating to them, No. 1265 of 1923, was instituted. In that case the plaintiffs sued for possession, mutation of their *adna milkiyat* rights having been made in favour of the defendants, the *ala maliks*, some ten or eleven years before the suit and after the land had emerged from the river. The first suit No. 19 of 1923 was tried by the Senior Subordinate Judge of Muzaffargarh. His decision was that the plaintiffs did not forfeit their rights to their lands but they were entitled to be re-instated on payment of *jhuri*. This decision was upheld on appeal by the District Judge on 16th April 1924 who, however, gave the defendants a certificate under the Punjab Courts Act entitling them to prefer a second appeal to this Court.

The suit No. 1265, which was instituted in June 1923, was tried by a Subordinate Judge, 4th Class, at Alipur. He gave the plaintiffs a decree for possession subject to the payment of Rs. 10-2-3 to the *ala maliks* as *haq jhuri*. The defendants, the *ala maliks*, appealed to the District Judge and the appeal was transferred for hearing to this Court along with the appeal No. 2028 in the suit No. 19 of 1923.

On the appeals coming before us a preliminary objection was taken by Mr. Mehr Chand for the respondents to the effect that both appeals had wholly abated. Sewa Mal (or Ram), one of the respondents, died in March 1928. No application to implead his representatives was presented until the 16th of April 1930, when an application was made which was granted subject to just exceptions. In the application it was stated that the petitioners came to know of

Sewa Mal's death only a month before; that Sewa Mal lived two miles from the petitioners' residence and that the petitioners were ignorant both of the fact of Sewa Mal's death and of the law. For the appellants Mr. Jagan Nath frankly admits that the appeal must abate so far as the share of Sewa Mal is concerned, but the decision of this Court in *Sant Singh* v. *Gulab Singh* (1) supports his contention that the appeal as a whole does not abate, inasmuch as the shares of the respondents in the property in dispute are actually defined in the record of rights relating to the property in suit and can be determined.

Diwala Mal, plaintiff-respondent in appeal No. 2991, died in April 1925. An application to have his representatives brought on the record was made in October 1925, the delay not being explained. Here again Mr. Jagan Nath admits that the appeal has abated in respect of the share of Diwala Mal. Following the ruling of this Court cited above I hold that neither appeal abates in its entirety. The appeal No. 2028 abates in respect of Sewa Mal's claim and the appeal No. 2991 in respect of the claim of Diwala Mal.

It is admitted that in the *wajib-ul-arz* prepared at the settlement of 1866 there was no mention of any customary rule regarding the rights of *adna maliks* in lands which had become submerged and had re-emerged. There was, however, an entry in the *wajib-ul-arz* of 1880. I may here state that the lands in dispute are situated in *Patti* Kathpalwali of the village. The entry runs as follows :—

" *Is mauza men do qism malikiyat i ala wa adna aur do patti zail, Kathpalwali aur Nurwali ke nam se*

(1) (1929) I. L. R. 10 Lah. 7 (F.B.).

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raqba deh haza mausum hai. Patti Kathpalwali men jis malik ki zamin burd ho jati hai to baramadgi ke waqt woh arazi malkiyat malikan i ala ki koti hai. Malikan i adna ka us zamin par kuchh istihqaq nahin hota. Malikan i adna bagair dene haq jhuri malikan i ala ko mustahiq qabza karne ke na hone ke bila dene haq jhuri unka kuchh wasta na hoga. Agar malikan i ala jhuri amdan na lewen to malik adna us raqba baramda par qabza karne ke majaz nahin hai. Aur jhuri ka tasfiya baham malik ala wa adna hasb haisiyat arazi ho jata hai. Sharah khass kar koi muqarrar nahin hai. Yih ikhtiyar malikan i ala salam ya juzaw chahat wa pattiyat jo burd ho kar baramad ho barabar masawi hoga. Aur patti Nurwali men jis qadr raqba maqbuza i malikan burd hojawe to baramdagi par wuh raqba baqadar burd shuda malikan i adna ka haq hoga. Malikan i ala sirf haq mukaddami ke mustahaq honge. Agar burd shuda se ziyada raqba baramad ho to wuh malkiyat malikan i ala ke hota hai." The word "*aur*" after "*majaz nahin hai*" is omitted in the translation in in the printed book. The wording of the corresponding entry in the *wajib-ul-arz* of 1900 is a little different (see D. 2 at page 66 of the Printed book). The entry runs as follows :—

"*Is gaon men haquq ala wa adna malikan qayam hain. Do pattiyat i zail deh haza men waqai hain :— Patti Kathpalwali, Patti Nurwali. Patti Kathpalwali men raqba milkiyat adna agar burd ho jawe aur baramad howe to milkiyat malikan i ala qarar pati hain. Malikan i adna jin ki arazi burd hui thi haq jhuri hasab hasiyat arazi dekar malik adna qarar pate hain. Agar malikan ala amadan haq jhuri lena manzur na karen to malikan adna qabza karne*

ke mustahiq nahin hain aur faisla haq jhuri hasab hasiyat hoga."

Patti Nurwali men jis malik ki arazi burd ho usi ka nuqsan hota hai. Bawaqt baramadgi us ki milkiyat tassawwar hoti hai. Adna malikan ki baramadgi ke waqt ala malikan ko nahin milti hai. Haquq milkiyat ala wa adna us hi tarah qaim rahte hain jaise ke qibl as burdi the, koi haq jhuri nahin liya jata."

The entry in the *wajib-ul-arz* of the settlement of 1921-22 is the same as the entry of 1900-01. At the time when the lands to which the possessory suit relates emerged from the river the current *wajib-ul-arz* was that of 1900-01 which, as I have already mentioned, is worded in the same way as the entry in the *wajib-ul-arz* of 1921-22. Presumably the alteration in 1900-01 of the entry of 1880 was deliberate and is the more accurate record of the custom stated to prevail in *Patti* Kathpalwali.

After hearing what counsel on both sides have to say I am of opinion that the findings of the Courts below as to the true construction of the words in the *wajib-ul-arz* are correct. The entry must be read as a whole and the only reasonable and consistent interpretation of it seems to me to be this; In *Patti* Kathpalwali if an area owned by *adna* proprietors is washed away and then re-appears, it is held to be the property of the *ala* proprietors but the *adna* proprietors have a right to be re-instated if they are prepared to pay *jhuri*. If the *ala* proprietors do not intentionally (*amadan*) accept the *jhuri* dues offered, then the *adna* proprietors are not entitled to take possession (*qabza*) of the land until fair *jhuri* dues fixed with regard to the quality of the land are paid.

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This interpretation finds support in the judgment of the Chief Court, *Ahmad Shah, etc.* v. *Khuda Bakhsh, etc.* (1), which relates to the custom in village Muradpur in the same *Tahsil* (Alipur) as that in which the lands now concerned are situated. The relevant entry in the *wajib-ul-arz* of that village in 1898 is translated in the beginning of the judgment of Clark, C. J., and is similar to the entry in the first *wajib-ul-arz* of Kathpalwali Patti in Bet Nurwala. Unfortunately the record of the proceedings leading up to 21st November 1901 referred to in the judgment cannot be traced but the judgment states that it had been decided that the plaintiffs in that case had the right to be declared *adna maliks* of the land in suit, the only question remaining for decision being whether the rights of the plaintiffs to be declared *adna maliks* was dependent on a payment to the *ala maliks* of a *haq jhuri* and, if so, what the amount of *haq jhuri* should be. The decision was that the *adna maliks* could not take possession without paying the due.

My finding as to the true interpretation of the entry in the *wajib-ul-arz* relating to *Patti* Kathpalwali decides the issue between the parties in each case. Mr. Jagan Nath who would have us translate the entry as meaning simply that the *adna maliks* retained no right of re-entry against the wishes of the superior proprietors, bases his argument mainly on the evidence of a number of mutations and four judicial decisions. Three of the mutations are of the year 1912, printed at pages 68-71 of the printed book, all sanctioned on the 5th of May 1912. Two of these are contested in the present appeals. The others were sanctioned in 1920 and later, no doubt, on the precedent of 1912. These mutations are obviously without

(1) 33 P. R. 1903.

any considerable evidential value as evidence of ancient and established custom. Two of the judicial rulings relied upon by Mr. Jagan Nath are unpublished judgments of the Chief Court. The first is the one in Civil Appeal No. 515 of 1890, decided by Benton and Rivaz JJ., on 7th April 1892. It relates to land in Azmatpur in Alipur *Tahsil*, the *wajib-ul-arz* of which village prepared in 1900-01 was similar to that of Bet Nurwala. The learned Judges certainly in that case took the view that *adna* proprietors did not retain a right of re-entry but the weight of this authority is greatly lessened by the judgment in *Ahmad Shah* v. *Khuda Bakhsh* (1). The second decision is that in the further appeal 1208 of 1907, decided by Clark C. J., on the 9th of April 1908. It also relates to lands in another village, Madwala; and it appears from the judgment of the Divisional Judge in that case (which is exhibited at page 92 of the printed record) that the *wajib-ul-arz* of Madwala clearly stated that there was no custom of *jhuri* in the village. The remaining judicial decisions on which Mr. Jagan Nath relies are *Sahib Din* v. *Ilam Din* (2), and *Sardar Muhammad Chiragh Khan* v. *Amir Chand* (3). The first of these two relates to land in village Khanpur (Gujrat district), the *wajib-ul-arz* of which apparently clearly stated that when a proprietor's land became submerged it became *shamilat-i-deh* on re-appearance. The judgment *Sardar Muhammad Chiragh Khan* v. *Amir Chand* (3) relates to land in Shahpur district and the decision depended on the interpretation of an entry in the *wajib-ul-arz*, not similar to that in the *wajib-ul-arz* of Bet Nurwala. In that case also the meaning of the entry in the *wajib-ul-arz* was unambiguous.

(1) 33 P. R. 1903. (2) 15 P. R. 1904.
(3) 18 P. R. 1914.

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On the other hand, we have in favour of the respondents, the *adna maliks*, that there is no instance, apart from the mutations to which a reference has been made, showing that in *Patti* Kathpalwali of this village the *adna maliks* have, as a fact, ever been deprived of their right to take possession, on payment of *jhuri*, of land which has re-appeared after being submerged, while it is proved that in 1889 a dispute between the *ala maliks* and the *adna maliks* over land which had so re-appeared was settled by a compromise in accordance with which the *adna maliks* paid proprietary dues to the *ala maliks* and regained possession.

Much time was spent by counsel for the respondents in arguments urged in support of the lower Court's decree on the grounds that the *wajib-ul-arz* in this case is a document of little or no authority, being merely an *ex-parte* statement by the proprietors of their own rights, that it was not shown to be acted upon until 1912, and that the interpretations of the entry in the *wajib-ul-arz* in the manner in which Mr. Jagan Nath asks us to interpret it, would be to accord sanction to a principle highly inequitable and entirely opposed to the "principles of natural and universal law." In view of my decision as to the correct meaning of the *wajib-ul-arz* it is unnecessary to discuss these arguments here. Suffice it to say that Mr. Mehr Chand does not attempt to contend that the interpretation now put upon the entry is inequitable or otherwise objectionable, nor could I find any force in such a contention in view of the emphatic judgments in *Ahmad Shah* v. *Khuda Bakhsh* (1), and the further appeal No. 1208 of 1907.

(1) 33 P. R. 1903.

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In the judgment which was upheld on appeal by Clark C. J. in the latter case, the learned Divisional Judge of Multan Division had remarked that the custom recorded in the *wajib-ul-arz* that the *adna malik* had no right to claim re-entry was not inequitable and had actually been acted upon in thirty-six instances in Madwala as well as in a few instances in its sister villages.

For the reasons given I would dismiss these appeals with costs.

TEK CHAND J.

TEK CHAND J.—I agree with my learned brother in his interpretation of the entry in the *wajib-ul-arz* in question and in holding that on this interpretation the appeals fail and must be dismissed with costs. On this finding, it is not necessary to give a decision on the alternate argument, addressed to us by counsel for the respondents, which has been noticed in the penultimate paragraph of my learned brother's judgment, and I reserve my opinion on it for a future occasion.

A. N. C.

Appeals dismissed.