FULL BENCH.

Before Coldstream, Bhide and Currie JJ.

LUDDARMANI (PLAINTIFF) Appellant

versus

THE RAJA OF GULER (DEFENDANT) Respondent.

1935

April 3.

Civil Appeal No. 374 of 1930.

Custom — Succession — Adna Malkiyat — *Kangra district* — Adna Malik *mortgaging his land, and then dying without natural heirs — whether* Ala Malik *succeeding him is bound by the mortgage.*

The *Adna Malkiyat* in dispute was situate in the *Jagir* territory of the Raja of Guler in the Kangra district and the latter claimed to have succeeded to it, free from the mortgage created by the deceased *Adna Malik*. The question referred to the Full Bench was "When an *Adna Malik*, having full power to sell or mortgage, effects a mortgage of his land and then dies without natural heirs and the *Ala Malik* takes the estate, does he take it subject to the encumbrance created by the *Adna Malik* or free from it."

Held, that in view of the terms of the *Wajib-ul-arz* the *Ala Malik* in the *Jagir* of Guler took the estate in such circumstances subject to the encumbrance, but that the *Adna Malkiyat* rights vary in different places and the question has to be decided on the facts of each case.

The *Wajib-ul-arz*, referred to.

Surjan Singh v. *Lalu* (1), and *Sher Khan* v. *Pir Buksh* (2), distinguished. *Baldev Singh* v. *Rasilla* (3), relied upon.

Hira v. *Chahnnu* (4), and *Omanath Chowdry* v. *Sheikh Nujeeb Chowdry* (5), referred to.

Second Appeal from the order of R. B. Lala *Rangi Lal, District Judge, Hoshiarpur, dated 19th December, 1934, reversing that of* Mehta *Dwarka Nath, Senior Subordinate Judge, Dharamsala, dated 22nd February, 1929, and dismissing the plaintiff's suit.*

(1) 175 P. R. 1888.
(2) 79 P. R. 1878.
(3) 1928 A. I. R. (Lah.) 464.
(4) 129 P. L. R. 1912.
(5) (1861) 8 Moo. I. A. 500, 527.

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FAKIR CHAND and CHIRANJIVA LAL AGGARWAL, for Appellant.

M. C. MAHAJAN and YASHPAL GANDHI, for Respondent.

The Orders of Coldstream and Bhide JJ., dated 27th November, 1934, submitting the case to a Full Bench—

BHIDE J. BHIDE J.—Beli Ram, who was the *Adna Malik* of the land in dispute which is situated in the Kangra district, mortgaged it in favour of one Luddarmani in the year 1913. Subsequently, the land was mutated in favour of the Raja of Guler as the *Ala Malik* of the land, Beli Ram being believed to be dead, and the mortgage charge being held to be extinguished. Luddarmani having been thus deprived of the land, instituted the present suit to recover possession and mesne profits. The suit was based on the allegations that Beli Ram was still living, that even if he was dead the Raja of Guler was not entitled to succeed and finally that the mortgage was in any case not extinguished. The trial Court granted the plaintiff a decree, but the learned District Judge dismissed the suit on appeal. From this decision the plaintiff has preferred a second appeal.

The learned District Judge's finding that Beli Ram, not having been heard of for more than 7 years, must be presumed to be dead cannot be questioned in second appeal. Similarly, the learned District Judge's finding, that Beli Ram being without heirs, the Raja of Guler, as the *Ala Malik*, was entitled to succeed, cannot be challenged. The learned counsel for the appellant, however, urged that even if the Raja succeeded to the rights of Beli Ram, the mortgage could not

be extinguished, inasmuch as according to the terms of the *Wajib-ul-arz* Beli Ram, as an *Adna Malik* had full right to sell or mortgage the land. The learned District Judge has held, following *Surjan* v. *Lalu* (1), that on the death of Beli Ram without heirs, the *Adna Malkiyat* rights ceased to exist and consequently the mortgage thereof was also extinguished. The learned counsel for the appellant challenged the correctness of the view taken in *Surjan* v. *Lalu* (1) and relied on *Sardar Sarup Singh* v. *Sundar* (2), *Khurshaid Alam* v. *Phangu* (3) and *Balder Singh* v. *Rasilla* (4). The first two of these authorities do not appear to be of any assistance for the decision of the question whether the mortgage in question should or should not be considered to have become extinct. In *Sardar Sarup Singh* v. *Sundar* (2) and *Khurshaid Alam* v. *Phangu* (3) the only question for decision was whether the *Ala Malik* was entitled to succeed on the death of the *Adna Malik* without heirs, and it was held on the evidence produced in these cases that he was not so entitled. In the present case it has been found on the basis of the *Wajib-ul-arz* and other evidence that the *Ala Malik* was entitled to succeed.

The third case *Baldev Singh* v. *Rasilla* (4), however, appears to be in point. The judgment in that case covers appeals in four suits instituted by the Raja of Guler, challenging alienations made by certain *Adna Maliks* or their widows. It was held in that case (as in the present case), that the *Adna Maliks* had full powers to sell or mortgage their lands and the Raja's suits for possession or declaration in respect of alienations made by male *Adna Maliks* were dismissed. The widows of *Adna Maliks* were considered to have

(1) 175 P. R. 1888.
(2) 9 P. R. 1898.
(3) 1924 I. L. R. 5 (Lah.) 382.
(4) 1928 A. I. R. (Lah.) 464.

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only a life interest and hence their alienations were held to be subject to control by the Raja; but in the present instance, we are not concerned with that aspect of the question as the alienation in the present instance was made by a male *Adna Malik*. It was urged by the learned counsel for the respondent that *Baldev Singh* v. *Rasilla* (1) is distinguishable as the decision in that case was based merely on the ground that the Raja had failed to prove that he had, according to custom, any right to control an alienation by a male *Adna Malik*. But this clearly involves the assumption that the *Ala Malik* could not challenge an alienation by an *Adna Malik* in the absence of a custom to that effect—the *Adna Maliks* being found to be entitled to sell or mortgage. If the view taken in *Surjan* v. *Lalu* (2) that an *Adna Malkiyat*, and along with it any mortgage effected by an *Adna Malik*, becomes extinct on the death of the *Adna Malik* without heirs were accepted as correct, it would have been hardly necessary to consider the question of custom. For any sales or mortgages effected by an *Adna Malik* would, according to that view, cease to be operative on the death of the *Adna Malik* without natural heirs.

The decision in *Surjan* v. *Lalu* (2) appears to be based mainly on two propositions, *viz.* :—

(*i*) An *Ala Malik* does not succeed as an heir; what happens is that by the *Adna Malkiyat* becoming extinct, the rights of the *Ala Malik* are relieved from an encumbrance and become absolute;

(*ii*) In the case of a mortgage what is pledged to the mortgagee is the *Adna Malkiyat*, and when this ceases to exist, the mortgage itself necessarily comes to an end also.

(1) 1928 A. I. R. (Lah.) 464. (2) 175 P. R. 1888.

As regards the first proposition reliance was placed on *Sher Khan* v. *Pir Buksh* (1). But that was a case of a mortgage by an occupancy tenant. It may, however, be pointed out that in the case of an occupancy tenancy, there is a distinct provision in the Punjab Tenancy Act, that the tenancy becomes extinguished in default of heirs. The *Adna Malkiyat* rights are different to the rights of an occupancy tenant. When there are *Ala* and *Adna Maliks* of any land, the proprietary rights are divided between the two classes of owners in varying degrees (*cf.* Punjab Settlement Manual by Douie, para. 142 *et seq.*) In the present instance the *Adna Maliks* appear to have enjoyed practically all the proprietary rights subject to payment of 25 *per cent.* of the land revenue to the *Ala Malik*. Such rights can hardly be described as a mere "encumbrance" on the original ownership. The *Ala Malik* is no doubt entitled to succeed to the *Adna Malkiyat* in default of natural heirs and when this contingency occurs, the payment of the 25 *per cent.* of land revenue comes to an end. But it is difficult to see why a charge on the land which the *Adna Malik* had full power to create according to the *Wajib-ul-arz* should come to an end. In *Surjan* v. *Lalu* (2), it was remarked that the *Ala Malik* does not take the land as an heir, but it may be mentioned that the *Riwaj-i-am* mentions him in the line of heirs. (*See* question 54, Customary Law of the Kangra District, 1919). The phraseology of the *Wajib-ul-arz* is similar and there is no mention in it of the extinction of the *Adna Malkiyat* rights.

In the present instance, the *Adna Malik* had only mortgaged his land, but according to the *Wajib-ul-arz* he had power to sell also. The situation created by a

(1) 79 P. R. 1878. (2) 175 P. R. 1888.

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sale would be still more anomalous. If an *Adna Malik* has full power to sell the land, the vendee presumably becomes an *Adna Malik* and the chances of the *Ala Malik* succeeding to the property are indefinitely postponed even if the original *Adna Malik* dies childless. The *Ala Malik* is thus bound by the effect of the sale. Why should his position be any better in the case of a mortgage?

The learned counsel for the respondent relied on Civil Appeal No. 843 of 1934, recently decided by a learned Judge of this Court, but that ruling merely follows *Surjan* v. *Lalu* (1).

It seems to me that the point raised in this case is important and requires an authoritative decision. I would, therefore, refer (if my learned brother agrees) the following question to a Full Bench :—

When an *Adna Malik*, having full power to sell or mortgage, effects a mortgage of his land and then dies without natural heirs and the *Ala Malik* takes the estate, does he take it subject to the encumbrance created by the *Adna Malik* or free from it?

COLDSTREAM J.—I agree.

THE ORDERS OF THE FULL BENCH.

BHIDE J.

BHIDE J.—The facts of the present case and the reasons for a reference to a Full Bench are given in our order, dated the 27th November, 1934, and need not be repeated. The main point for consideration is whether the view taken in *Surjan* v. *Lalu* (1) is correct. As regards this point the learned counsel relied firstly on the finding of the Courts below that the Raja of Guler—the *Ala Malik* in the present case—is not a mere *Talukdar* but has higher rights. This finding of fact must, of course, be accepted as correct

(1) 175 P. R. 1888.

for the purposes of this reference. It was urged next that in the circumstances, the *Ala Malik* must be considered to be the real owner of the land, and the estate of the *Adna Malik* must be looked upon as a mere "encumbrance," which ceases to exist, when the *Adna Malik* dies without heirs. In support of this argument, reference was made to the remarks on the nature of "ownership" at pages 278-80 and 475 of Salmond's Jurisprudence (8th edition). It was argued that "ownership" can never be divided and that in spite of the fact that the *Adna Malkiyat* in the present case included extensive rights not only of user and enjoyment but also of disposition by sale and mortgage, "ownership" in the legal sense of the term remained with the *Ala Malik* and the rights of the *Adna Malik* were merely in the nature of an "encumbrance." It was urged further that the "encumbrance" merely comes to an end when the *Adna Malik* dies without heirs and that it is incorrect to look upon this as a case of succession or inheritance. Lastly, as a result of this proposition, it was contended that when the encumbrance comes to an end, the mortgage thereof must also necessarily come to an end as it does in the case of occupancy rights in similar circumstances.

It has been pointed out in *Hira* v. *Chahnnu* (1), that the *Ala Maliks*, usually found in this Province, belong to one or the other of two categories, *viz.* (1) where the *Ala Maliks* so called are merely *Talukdars*, whose ancestors have been farmers of revenue or conquerors who have been content to leave all management, etc. to the conquered peasantry and take quit rents and (2) when the *Ala Maliks* were originally the sole proprietors of the soil of the village and have called outsiders and settled them on some or all of the

(1) 129 P. L. R. 1912.

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lands. It is usually in the case of the latter class that the *Ala Malik* is entitled to the right of reversion on the death of an *Adna Malik* without natural heirs. In the present instance, it has been found by the Courts below as already stated that the Raja of Guler, the *Ala Malik* has higher rights than those of a *Talukdar*, and the right of reversion is given to him by the *Wajib-ul-arz*. It was, therefore, urged that the Raja must be taken to belong to the second class of *Ala Maliks* referred to above and must have been originally the sole proprietor of the land held by the *Adna Maliks*. There is no evidence on the record to show precisely the manner in which the *Adna Malkiyat* rights arose in the present case. But, even assuming the inference to be correct, the point does not appear to be so material; for what we are concerned with is not the historical origin but the present position as regards the respective rights of the Raja and the *Adna Maliks*. These rights have not to be decided merely on the basis of some legal theory or inferences to be drawn from the probable historical origin of the *Adna Malkiyat* rights. Fortunately, we have in this case a statement of the respective rights of the *Ala* and the *Adna Maliks* in the *Wajib-ul-arz* of the village and it is obviously on the basis of this *Wajib-ul-arz*, which is binding on both the parties, that the question referred to the Full Bench must be decided.

Now the *Wajib-ul-arz* distinctly confers on the *Adna Maliks* full power of sale and mortgage. The learned counsel for the respondent concedes that if an *Adna Malik* sells his rights, the sale is binding on the Raja. In the circumstances, it is difficult to understand why a mortgage which really involves a lesser interference with his rights, should not be binding on the Raja. The *Wajib-ul-arz* places the powers of sale

and mortgage on the same footing. If the intention was that a sale should be binding on the Raja but not a mortgage, one would have expected to find some provision to that effect in the *Wajib-ul-arz* but no such provision exists therein. In the absence of any such provision, the position taken up by the learned counsel for the respondent seems to be neither logical nor reasonable and I am of opinion that it cannot be sustained on a proper reading of the terms of the *Wajib-ul-arz*.

The learned counsel has tried to justify the position taken up by him chiefly on the basis of his contention that " ownership " in the true legal sense (which is known as *jus in re propria* as distinguished from *jus in re aliena*) still remained with the Raja in spite of the extensive rights of user and disposition enjoyed by the *Adna Maliks*, which he maintained are merely in the nature of an " encumbrance." Assuming for the sake of argument that this is theoretically a correct position, I do not see how the conclusion follows that the " encumbrance " must necessarily become extinct, when the holder of the " encumbrance " dies without heirs. This must, I think, depend upon the nature of the encumbrance and on the agreement on the subject between the parties, such as is embodied in the *Wajib-ul-arz* in the present case. The analogy of occupancy rights is, I think, misleading, for in the case of occupancy rights there is a distinct provision that such rights become extinct when the occupancy tenant dies without leaving heirs (*vide* section 59, Punjab Tenancy Act). In the present instance, the *Adna Maliks* enjoyed practically all the proprietary rights. Moreover, the power to sell and mortgage was distinctly conferred upon the *Adna Maliks* by the *Wajib-ul-arz* which is binding on the *Ala Malik* and when

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that power is exercised, I see no good reason to hold that the alienation is binding, if it takes the form of a sale, but not if it takes the form of a mortgage. It was urged that the *Wajib-ul-arz* merely gives power to mortgage the *Adna Malkiyat* rights and not the land and as these rights come to an end when the alienor dies without heirs, the mortgage must also come to an end. But I fail to see why this argument, if sound, should not apply to sales also. But it was conceded that sales are binding on the Raja. The ruling reported in *Baldev Singh* v. *Rasilla* (1) also implies that the Raja was bound by such alienations, effected at any rate by a male *Adna Malik* unless he could challenge them on any grounds allowed by custom.

The learned counsel's contention that this is not a case of inheritance of the *Adna Malkiyat* rights by the Raja but of merger was also not supported by authority. The *Riwaj-i-am* distinctly mentions the *Ala Malik* in the line of heirs. The wording of the *Wajib-ul-arz* is not so clear. It merely says " *unka* (*i.e.* of the *Ala Malik*) *haq hoga*," but I do not see that this wording justifies the conclusion that the *Adna Malkiyat* rights merely become extinct by merger. There is, I think, no doubt that the *Adna Malik's* rights do not merely cease to exist. So long as the *Adna Malik* exists, the *Ala Malik* does not possess them, and on the death of the *Adna Malik*, these rights revert to the *Ala Malik*. I see no good reason to hold in the circumstances that they merely become extinct.

The learned counsel referred to the fee simple estate under English Law as a parallel case, but he was unable to cite any authority to show that where

(1) 1928 A. I. R. (Lah.) 464.

such an estate escheats to the Crown, in default of heirs, the Crown takes it, free from any encumbrances created by the last holder. A tenant in fee simple has since the statute of *Quia Emptores* free powers of alienation, and from the remarks at pages 104 and 105 of Williams on Real Property (24th Edition), it would seem that the Crown, if it takes such an estate by escheat, as the paramount lord, would take it subject to encumbrances created by the tenant. This certainly appears to be the position in India in the case of an estate reverting by escheat to the Crown. For, it has been held by their Lordships of the Privy Council in *Omanath Chowdry* v. *Sheikh Nujeeb Chowdry* (1), that an estate taken by the Crown by escheat is subject to trusts and charges, if any, previously affecting the estate. I see no reason why the reverter of an estate to an *Ala Malik* should be held to stand on a different footing.

It seems to me, therefore, that the contention of the respondent in this case can be supported neither on the terms of the *Wajib-ul-arz*, nor on any sound principle or authority. The learned counsel for the respondent urged in the end that the contention should be upheld at least on the principle of *stare decisis*. But the only published ruling in point in favour of the respondent which was cited was *Surjan* v. *Lalu* (2). It may be pointed out that the *Adna Maliks* in that case had not the right to mortgage their rights and the present case is thus distinguishable. The learned Judges, no doubt, stated that even if the *Adna Malik* had the power to mortgage this would not have affected their decision. But strictly speaking, their remarks on the point before us are in the nature of *obiter dicta*. That case moreover does not relate to Guler. The

(1) (1861) 8 Moo. I. A. 500, 527. (2) 175 P. R. 1888.

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learned District Judge has remarked that the view expressed in *Surjan* v. *Lalu* (1) has been consistently followed in the district to which this case relates. But he has referred to only two cases. Neither of them related to Guler, and in one of them (Ex. D.1), the alienations were also found to be without necessity. The other is a decision by a Munsiff in which the alienation was by a widow. The *Adna Malkiyat* rights vary in different places, and the question has to be decided on the facts of each case. There is not a single previous decision of any importance relating to Guler on the record of this case to support the position taken up by the respondent, while Exhibits P.12 and P.13 which relate to a Guler case, the High Court decision in which is reported as *Baldev Singh* v. *Rasilla* (2), seem to carry an implication to the contrary. In view of all these circumstances, I see no good reason to uphold the decision of the Court below merely on the principle of *stare decisis*.

For the reasons given above, I would hold that in the circumstances stated, when the *Adna Malik* has full power to mortgage, the *Ala Malik* takes his estate on reversion subject to any encumbrance created by the *Adna Malik* and I would answer the question referred to the Full Bench accordingly.

CURRIE J.

CURRIE J.—I have had the advantage of reading the draft judgment of my learned brother Bhide.

I may note that Civil Appeal No. 843 of 1934, decided by me related to Lambagraon. That case was decided on the material placed before me. Apparently no reference was made to the terms of the *Wajib-ul-arz*. I, therefore, saw no reason in that case for departing from the rule enunciated in *Surjan* v. *Lalu* (1).

(1) 175 P. R. 1888. (2) 1928 A. I. R. (Lah.) 464.

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CURRIE J.

In the present case, in view of the terms of the *Wajib-ul-arz*, I agree with the answer he proposes to give to the question referred to the Full Bench, in so far as it relates to cases of the extinction of *Adna Malkiyat* rights occurring in the domain of the Raja of Guler.

Where an *Ala Malik* is a mere *Talukdar*, I think, the proposed answer is undoubtedly correct. In other cases, however, I am averse to laying down any general rule regarding the extinction of *Adna Malkiyat* rights as the *Adna Malkiyat* tenure varies in different parts of the Province and, in some cases, is closely akin to ordinary occupancy rights as defined in the Punjab Tenancy Act. Where, as in the present case, the power of sale and mortgage is unfettered, I have no doubt that it would require very cogent evidence as to custom to show that a mortgage charged on the land by an *Adna Malik* was extinguished on the extinction of the *Adna Malkiyat* tenure in favour of the *Ala Malik*. In each case, however, it would, in my view, be necessary to trace the origin of the tenure before any decision could be given on the point.

COLDSTREAM J.

COLDSTREAM J.—I agree with my learned brother Currie and would answer the question referred to us in the manner proposed by my learned brother Bhide with the reservation that the answer must be held to relate to cases arising in the *Jagir* territory of the Raja of Guler to which the *Wajib-ul-arz* relied upon in this case is applicable.

P. S.