APPELLATE CIVIL.

Before Bhide and Currie JJ.

1935

Nov. 6.

FATTEH SHER AND OTHERS (DEFENDANTS) Appellants

versus

BEHARI RAM AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 657 of 1934.

The Sindh Sagar Doab Colonization Act, Punjab Act I of 1902 — Effect of the repeal of the Act in 1929 on the rights of the proprietors, who had reclaimed shamilat *land during the time when the Act and certain agreements made under it were in force* — Wajib-ul-arz *of 1878.*

In 1902, when the Sindh Sagar Doab Colonization Act was passed, the proprietors of certain villages in the Bhakkar tahsil of the Mianwali district executed agreements, by which no one could acquire or be considered entitled to any proprietary or occupancy rights in *shamilat* land by sinking a well, or by reclaiming *barani* land, etc. The terms of these agreements were also incorporated in the *Wajib-ul-arzes* of the villages concerned, in which it was expressly stated that until the repeal of the agreements under the Sindh Sagar Doab Act, the conditions relating to the acquisition of the proprietary rights in the *shamilat* which were previously in force (*i.e.* as stated in the *Wajib-ul-arz* of 1878) shall remain in abeyance (*Sáqat rehenge*). The Sindh Sagar Doab Act was repealed in 1929 and admittedly the above named agreements thereunder then ceased to have any effect. Thereupon the plaintiffs, who had reclaimed the land in dispute, during the time when that Act was in force, brought suits for a declaration that they were entitled to *adna malkiyat* rights in the lands reclaimed by them in accordance with the provisions of the *Wajib-ul-arz* of 1878.

Held, that the reclamation of lands during the continuance of the Sindh Sagar Doab Act could not result in the acquisition of any *adna malkiyat* rights at any time, as none of the conditions according to which such rights could accrue were in operation, when the land was reclaimed.

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Civil Appeal No.674 of 1932 (*Ahmad Khan v. Jiwana*), decided on the 15th January, 1935 (1), referred to.

Second appeal from the decree of Mr. P. R. B. May, District Judge, Mianwali, dated 11th December, 1933, reversing that of Sayyad *Shaukat Hussain, Senior Subordinate Judge, Mianwali, dated 5th June, 1933, and ordering the plaintiffs to deposit the amount of* Jhuri due *for the land in suit within 30 days of the date of his judgment failing which their suit shall stand dismissed.*

J. N. AGGARWAL and KANWAR BHAN, for Appellants.

M. L. PURI and QABUL CHAND, for Respondents.

BHIDE J.

BHIDE J.—This judgment will dispose of the following twenty-two appeals in which the facts are similar and the point for decision is the same:—Nos.657 to 674 of 1934; and Nos.726-727 of 1934.

The sole point for decision in these appeals is whether the plaintiffs are entitled to *adna malkiyat* rights in the lands in dispute as claimed by them. The trial Court decided the point against them, but on appeal the learned District Judge has found it in their favour and decreed their suits. From that decision, the defendants have preferred these appeals.

The lands in dispute are situated in different villages in the Bhakkar *tahsil* of the Mianwali district, but it was admitted before us that the material facts bearing on the only point which requires decision in these appeals are the same. These facts may be shortly stated as follows:—

The plaintiffs in all these cases are *ala* and *adna maliks*, who claim to have reclaimed the lands in dispute and thus acquired *adna malkiyat* rights therein in accordance with the provisions of the *Wajib-ul-arz* of

(1) Printed on page 510 *infra*.

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1878. It is admitted that the reclamation was made during the period from 1902 to 1929, when the Sind Sagar Doab Act was in force. It is common ground that during this period the plaintiffs were debarred from acquiring *adna malkiyat* rights, but plaintiffs claim that with the repeal of the Sind Sagar Doab Act in 1929 the prohibition as regards the acquisition of these rights ceased to operate and they are now entitled to be declared *adna maliks* on payment of *jhuri*, which they are and have been willing to pay, but which defendants have refused to accept. The defendants on the other hand maintain that any reclamation made during the period when the Sind Sagar Doab Act was in force could not confer any proprietary rights at all, as the conditions relating to the acquisition of such rights were not then in operation.

Before proceeding to discuss the evidence relating to the above question, it may be stated that the Sind Sagar Doab Act was passed in the year 1902, with a view to establish the title of the Government in land to be acquired in connection with the proposed construction of a canal in certain territories lying between the river Indus and the rivers Chenab and Jhelum, which are included within the limits of the Mianwali, Shahpur, Jhang and Jhelum districts and commonly known as the Sind Sagar Doab. This Act enabled the Government to take agreements from the proprietors of the villages concerned for the surrender of their rights in the land to be acquired, and in pursuance of the Act, agreements in a prescribed form were taken from the proprietors of the villages with which we are now concerned. Paragraph 2 of the agreement ran as follows :—

" From the date of this agreement up to the date of such surrender, no one shall, notwithstanding any

law or custom to the contrary, acquire or be considered entitled to either proprietary rights or occupancy tenancy rights in the said lands or a part thereof by sinking a well, extending *chahi* lands, reclaiming *barani* land or cultivating the water-melon crop therein, as against Government." (*Vide* translation of the agreement marked as Exhibit P/10 on the record of appeals Nos.657-659).

In order to give full effect to this agreement the terms thereof were also incorporated in the *Wajib-ul-arz* prepared at the second settlement of 1902. With respect to the *shamilat* land, the villagers made the following declaration therein (*vide* Exhibit P/11, typed paper-book in Civil Appeals Nos.657-659 of 1934) :—

" We the proprietors of the village have signed the agreement under the Sind Sagar Doab Act, I of 1902. The Government shall take possession of the village *shamilat* on the introduction of the canal and shall return to the proprietors of the village as much area as shall be equal to 1/4th of the *shamilat*. We shall have powers, similar to the old in the 1/4th area returned to us by the Government. No one can acquire proprietary rights till then."

With regard to the reclamation of *barani* area, the following provision appears in paragraph 4 (*c*) of the same document :—

" On the *barani* area reclaimed, annas four per acre shall be charged which sum shall be allowed towards *Ghahchari* fund. Until the repeal of the agreement under the Sind Sagar Doab Act, the conditions relating to the acquisition of the proprietary rights in the *shamilat* shall remain in abeyance (*saqat [illegible]ge*)."

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The same terms were repeated in the latest *Wajib-ul-arzes* of the villages in 1924.

It will be clear from the above that the acquisition of proprietary rights while the agreements under the Sind Sagar Doab Act were in force, was distinctly prohibited. The canal project, in connection with which the Sind Sagar Doab Act was passed, was, however, eventually abandoned, and as a result the Act itself was repealed in the year 1929 (*vide* Punjab Act VI of 1929).

It is not disputed that as a result of the repeal of the Sind Sagar Doab Act, the agreements taken thereunder ceased to have any effect. The plaintiffs' contention (which has found favour with the learned District Judge), however, was that the conditions as regards the acquisition of proprietary rights which were stated in the *Wajib-ul-arz* of 1878, were only in abeyance or out of use during the period 1902-1929 and that on the repeal of the Sind Sagar Doab Act those conditions revived and the plaintiffs could become *adna maliks* of the land already reclaimed by them during that period by payments of *jhuri*, as provided in the earlier *Wajib-ul-arz* of 1878.

Jhuri was not offered (and indeed it could not be offered owing to the agreement referred to above) at the time when the land was reclaimed; but the learned District Judge was of opinion that there was nothing in the *Wajib-ul-arz* or any other relevant document to show that *jhuri* must be offered at or about the time when the land is reclaimed, and he, therefore, held that the payment of *jhuri* after the repeal of the Sind Sagar Doab Act in 1929 was valid for the purpose.

It will thus appear that the main point for decision in these cases is the effect of the repeal o

Sind Sagar Doab Act on the rights of the parties in lands in dispute. The learned counsel for the respondents contended that all that was prohibited during the continuance of the agreements taken under the Act was the acquisition of *proprietary* rights and that all rights short of proprietary rights could be and were acquired during the period when the Act was in force. This contention is not, in my opinion, supported by the terms of the *Wajib-ul-arzes* of 1902 and 1924 and does not appear to be consonant with the object of the agreements taken under the Sind Sagar Doab Act. The *Wajib-ul-arz* recites that the *conditions* with respect to the acquisition of the proprietary rights will be in abeyance (*vide* paragraph 4 (*c*) of the extract from the *Wajib-ul-arz* of 1902-03 marked as Exhibit P/11, referred to above). The vernacular expression used is " *saqat rahenge*." The learned District Judge has translated this expression as equivalent to " out of use." I think it will be more appropriate to take the expression as equivalent to " remain abated or cancelled " (*vide* Dictionaries of the Hindustani language by Fallan and Platts). All the *conditions* relating to the acquisition were thus inoperative during the period and it is not correct to say that merely the final stage of actual acquisition of proprietary rights was prohibited. If the contention of the learned counsel for the respondents were correct, the plaintiffs would have at least become *Butamar* occupancy tenants as a result of the reclamation during the period from 1902-1929 (*vide Wajib-ul-arz* of 1878 marked as Exhibit P/12 on the record of Civil Appeals Nos.657-659 of 1934); but they have been entered in the revenue records as mere tenants-at-will. Moreover, the object of the agreements under the Sind Sagar Doab Act was to prevent the accrual

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of any new rights during the period when the agreements were in force. According to the agreements, the proprietors of these villages had to surrender the *shamilat* area to Government and on the construction of the canal the Government was to select and restore one-fourth thereof to the proprietors. The rights of the proprietors (or their legal representatives) in the land so restored were to be identical with those existing *at the time when the agreement was entered into* (*vide* paragraph 5 of the agreement Exhibit P/10). There could be no certainty as to what area would be thus restored and it was apparently for this reason that accrual of fresh rights in this area was prohibited. Consequently, even the accrual of rights other than proprietary rights, *e.g.* occupancy rights, would have been inconsistent with the object in view. The agreement was entered into in order to provide for the situation arising on the construction of the canal and not for the one which has now arisen owing to the unexpected abandonment of the project. It seems to me, therefore, that the reclamation of land during the continuance of the Act, could not result in the acquisition of any '*adna milkiyat*' rights at any time as none of the conditions, according to which such rights could accrue, were in operation, when the land was reclaimed.

There is another aspect of the question, which also deserves notice. According to the conditions of the *Wajib-ul-arz* of 1878 the *ala maliks* had the first right to reclaim *shamilat* and after them the '*adna maliks*' and these could become '*adna maliks*' of the land reclaimed by payment of *jhuri*. If any of the *ala maliks* abused this privilege and attempted to appropriate too much of the *shamilat*, the others could have stopped such appropriation by getti[illegible] the

shamilat partitioned. But this they could not do during the period when the Sind Sagar Act was in force as the *shamilat* could not be partitioned during that period. If it were held that those who reclaimed the *shamilat* during the continuance of the Sind Sagar Doab Act, could acquire ' *adna malkiyat* ' rights now by mere payment of *jhuri*, the other proprietors would be obviously prejudiced. It seems to me, therefore, that this could not have been the intention of the parties to the agreement.

The above view receives support from the judgment in Civil Appeal No.674 of 1932, decided by a Division Bench of this Court on the 15th January, 1935 (1). The material facts of that case were similar to those of the present case. The learned counsel for the respondents urged that there was no condition in that case as to the payment of any *jhuri* for the acquisition of *adna malkiyat* rights. But that would make that case even stronger from the standpoint of the respondents. For, in those circumstances, according to the contention of the respondents, the *adna malkiyat* rights would have automatically materialized on the repeal of the Sind Sagar Doab Act. But it was held that no such rights accrued as a result of reclamation made during the pendency of the Act.

In my judgment, the learned District Judge's view as regards the effect of the repeal of the Sind Sagar Doab Act cannot be sustained. I would accordingly accept all the appeals and restore the decrees of the trial Court. The point of law involved, not being free from difficulty, I would leave the parties to bear their costs throughout.

CURRIE J.—I agree.

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Appeal accepted.

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The judgment of Jai Lal and Coldstream JJ. in Civil Appeal No.674 of 1932, referred to in the above judgment—

COLDSTREAM J.—The suit from which this appeal arises was instituted in the Court of the Senior Subordinate Judge, Mianwali, by two of the proprietors of *Mauza* Ghulaman in Bhakkar *tahsil* of Mianwali district for a declaration that they have become *adna maliks* of an area of 3,229 *kanals* 10 *marlas* of land which they had reclaimed from the waste lands of the village area, of which they were recorded as non-occupancy tenants. Their case was that according to the provisions of paragraph 11 of the village *Wajib-ul-arz* prepared at the first regular settlement of 1878 a proprietor had the right to break up waste land adjacent to his own land already under cultivation, provided that there was no well-founded objection by persons whose grazing rights were affected by the new cultivation and that the new cultivation did not obstruct the flow of rain water into any existing well.

In 1902, to facilitate the acquisition of land in connnection with a project to build a canal in the Sind Sagar Doab, the Sind Sagar Doab Colonization Act (Act I of 1902) was passed enabling persons having rights in land to enter into agreements to surrender their rights to Government on conditions, some of which were prescribed by the Statute. In accordance with this Act the members of the proprietary body of Ghulaman executed an agreement by which they undertook to surrender their rights in the village waste (*shamilat*) from the date on which the excavation of the permanent flow canal was begun (saving rights of grazing in land not actually required for the project), the Local Government promising in the same deed to return the lands, the acquisition of which w

found necessary for the project, and to restore to the proprietors rights in an area equal to one-fourth of the area surrendered identical with the rights which had been held by them in the land surrendered. It was also stipulated that from the date of the agreement up to the date of such surrender no one was to have any right to acquire as against Government any rights in the *shamilat* by reclamation of waste land.

At this time the second regular settlement was in progress and the entry in the *Wajib-ul-arz* regarding the proprietors' rights to break up the waste was altered so as to bring it into conformity with this agreement and the new provisions ran as follows:— (I quote only the relevant portions).

"We, the proprietors of the village have affixed our signatures to the agreement under the Sind Sagar Doab Colonization Act, I of 1902. When a canal is constructed, the Government shall take possession of the village *shamilat*. We, the proprietors, will enjoy the old rights in the area, equal to a fourth share in the village *shamilat* which the Government returns in fulfilment of the conditions of the said agreement. Nobody can acquire proprietary rights in the village *shamilat* till then. (Exhibit P.2, paragraph 1 (2) at page 86 of the printed record). The conditions relating to acquisition of ownership, etc., in the *shamilat* area shall be held in abeyance till cancellation of the agreement under the Sind Sagar Doab Colonization Act." (Paragraph 4 (*c*) at page 88 of the printed record).

These provisions were repeated in the *Wajib-ul-* of the third regular settlement of 1924-26.

he Sind Sagar Doab Colonization Scheme did ture and in 1929 the Act was repealed.

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The plaintiffs' contention was that by this repeal the rights described in the *Wajib-ul-arz* of 1878, put in abeyance by the Act, I of 1902, had been restored and that they were entitled by virtue of those rights to become *adna maliks* of the land which they had broken up, whether they had brought it into cultivation before the Act was passed or after it.

On behalf of those proprietors who resisted this claim it was contended that the *Wajib-ul-arz* of the second settlement made it impossible for proprietors to acquire proprietary rights in the *shamilat* during the years 1901-02 to 1929 and the plaintiffs had, therefore, not acquired the right which they wished to be declared.

The learned Senior Subordinate Judge found that the area concerned, with the exception of 77 *kanals* 5 *marlas* had been brought under cultivation by the plaintiffs after the village proprietors had agreed to the provisions in the *Wajib-ul-arz* of 1901-06 which agreement prevented them from acquiring rights by breaking up the waste. He accordingly dismissed the suit except in so far as it related to the area of 77 *kanals* 5 *marlas*, in respect of which he granted the declaration prayed for.

The plaintiffs have appealed and ask for a declaration in respect of the whole area of 3,229 *kanals* 10 *marlas*. The contesting defendants have submitted cross-objections attacking the declaration decreed.

For the appellants it is argued by their counsel that the agreement entered into by the proprietors with Government did not affect their rights *inter se*, but was prescribed and executed only for the protection of Government and that, therefore, the rights of the village proprietors *inter se* described in the *Wajib-ul-arz* of 1878 had not been disturbed. He has also

argued that the *Wajib-ul-arz* of the second settlement did not, in any case, extinguish those rights, but merely placed them in abeyance so that when the Act I of 1902 was repealed the plaintiffs' right to the *adna malkiyat* of the area brought under cultivation was revived. He has referred us to reported English rulings to the effect that when an Act is repealed, it must be regarded as never having been in force except with regard to transactions past and closed, and in support of his argument he has quoted dictionary definitions of the word ' abeyance ' used in the English translation of the *Wajib-ul-arz* of the second regular settlement. (The word ' abeyance ' is, of course, not found in the *Wajib-ul-arz*, where the expression is that the previous provisions relating to the acquisition of ownership of the *shamilat* ' *sakit rahenge* ' which means ' will remain abated ').

In no part of this argument can I see any force. The *Wajib-ul-arz*, certainly recorded an agreement between the village proprietors. The fact is clear that (in consequence certainly of their agreement with Government) the proprietors agreed with each other that until the Government returned the one-fourth share which it had undertaken to return, nobody was to be able to acquire proprietary rights in the *shamilat*. It was for this reason that the plaintiffs were recorded as tenants-at-will and not as *adna maliks* in the waste reclaimed by them. The proposition that while this agreement was in force proprietary rights could not be acquired by reclamation was accepted by this Court in *Paira Ram v. Amin Chand* (Case No.3041 of 1922, decided on 16th May, 1927.)

It may be that the appellants' counsel is correct in contending that the repeal of Act I of 1902 had the effect of restoring the rights which were in abatement

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in consequence of the agreement recorded in the *Wajib-ul-arz* of 1901-08, but if this be a fact I see in it no basis for his argument that, though the appellants were unable as a fact to acquire rights by breaking up the waste between 1901 and 1929, they must be supposed to have acquired them because the agreement recorded in the *Wajib-ul-arz*, valid during that period, subsequently ceased to have effect. It is not denied that had the agreement not been in force, objections might have been raised to the breaking up of the waste by the plaintiffs under the provisions of the *Wajib-ul-arz*, or that the other proprietors might have prevented further reclamation by partitioning the *shamilat*. It is obvious that opportunity for such preventing action cannot be revived by the agreement coming to an end.

This disposes of the only points taken before us by appellants' counsel.

Finding no good reason for differing from the decision of the lower Court I would dismiss this appeal with costs.

The only cross-objection pressed is that the plaintiffs have been declared *adna maliks* in too large an area. We have examined the extracts from the land revenue records put in evidence and find that they support the decision of the lower Court that 77 *kanals* 5 *marlas* of land had been broken up by the plaintiffs before the passing of the Act I of 1902. I would accordingly dismiss the cross-objections with costs.

JAI LAL J.

JAI LAL J.—I agree.

P. S.

Appeal dismissed.