

BLACKER J.—I concur.

A. N. K.

*Reference answered in the negative.***LETTERS PATENT APPEAL.***Before Addison and Ram Lal JJ.*

MUSA AND OTHERS (DEFENDANTS) Appellants,

*versus*

GHULAM QASIM AND OTHERS (PLAINTIFFS)

AND ANOTHER (DEFENDANT) Respondents.

Letters Patent Appeal No. 32 of 1939.

*Adna Maliks — Ala Maliks — Submersion and emersion of land — Wajib-ul-arz of village Noon Nasheb, Tahsil Bhakkar, District Mianwali — Meaning of — Rights of parties with respect to land on emersion — Jhuri — payment of.*

The lands in suit situated in village Noon Nasheb in the Bhakkar Tahsil of the Mianwali District were washed away by the river and emerged subsequently. On emersion the former *adna maliks* seized the suit land and retained the possession thereof since then. The *ala maliks* brought the present action claiming that the land on emergence became *shamilat* and that the *adna maliks* — defendants — were not entitled to take possession in preference to, or without the permission of *ala maliks* and without paying *Jhuri*. The *adna maliks* pleaded that they had a preferential right to occupy the suit lands under the conditions of the *wajib-ul-arz* and that it was not necessary for them to obtain the permission of the *ala maliks* to occupy the lands.

*Held*, that according to *wajib-ul-arz*, an *adna malik* retains his ownership over a number or holding which has been only partially submerged; if however, his whole holding or a particular number is submerged (as happened in the present cases) it becomes *shamilat deh*. The *ala maliks* have a right to occupy *shamilat deh* and after them the *adna maliks*; but this is subject to the special right given to the

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*adna maliks*, whose land has been completely submerged, to get from existing *banjar shumilat* or from other land, which has re-appeared, areas equal to their submerged area. For these areas the *ala maliks* cannot refuse to take *Jhuri* and *adna maliks* are entitled to get possession and become *adna maliks* of the new areas by paying *Jhuri*.

Though *Jhuri* must be paid, there is nothing in the *wajib-ul-arz* which makes the payment thereof a condition precedent to the *adna maliks* taking possession of the land to which they are entitled. They are entitled to take possession as soon as they can and settle about the *Jhuri* thereafter.

*Hayat v. Mohammad Khan* (1), referred to.

*Letters Patent Appeal from the judgment of Blacker J. passed in Civil Regular Second Appeal No. 838 of 1938, on 29th November, 1938, affirming that of Mr. S. M. Haq, District Judge, Mianwali, dated 2nd February, 1938 (who affirmed that of Sheikh Abdul Hamid, Subordinate Judge, 4th Class, Bhakkar, dated 17th February, 1937), awarding the plaintiffs possession of the land in suit.*

S. L. PURI and TASSADUQ HUSSAIN, for Appellants.

HAR GOPAL, for Respondents.

The judgment of the Court was delivered by—

ADDISON J.—This judgment will dispose of Letters Patent Appeals 32 to 37 of 1939.

The lands in suit are situated in village Noon-Nasheb in the Bhakkar Tehsil of the Mianwali District. The land of the village was washed away by the river some time prior to 1922-1923 but emerged in 1924-1925. When the land emerged, the former *adna maliks* seized the suit lands and have been in possession ever since. The suits, which have given rise to these appeals, were instituted by the *ala maliks* on the 10th

February, 1936, just before the twelve years' period of limitation was to expire. They claimed that the land on emergence became *shamilat* and that the defendants *adna maliks* were not entitled to take possession in preference to, or without the permission of, the *ala maliks* and without paying *jhuri*. The *ala maliks* also contended that the area taken possession of by the various *adna maliks* defendants were in excess of the areas of their submerged land.

The *adna maliks* pleaded that they had a preferential right to occupy the suit lands under the conditions of the village *wajib-ul-arz*, that the areas were not in excess of the areas of the land lost by them and that it was not necessary for them to obtain the permission of the *ala maliks* to occupy the lands. They added that they had tendered *jhuri* to the *ala maliks* who refused to accept it.

The trial Court held that the defendants had appropriated the correct areas and that they were entitled to possess the lands in suit in preference to and without the permission of the *ala maliks*, but that as they had failed to prove that they had tendered *jhuri* to the *ala maliks*, they had lost their right to the suit lands. The suits were, therefore, decreed. The appeal to the District Judge was dismissed and an appeal to this Court was also dismissed by a learned Judge, who, however, granted a certificate to appeal to a Division Bench under the Letters Patent. The question is, therefore, now before us.

Paragraph 1 of the *wajib-ul-arz* is as follows :—

“ The *ala maliks* have the first right to cultivate the *shamilat*, and after them this right devolves on the *adna maliks*. If the latter have no intention or means to occupy

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this *shamilat* land, the *ala maliks*, or *lambardars* after consulting the *ala maliks*, can give the land to other people on such conditions as they think fit. If *jhuri* is taken from such persons, they will become *adna maliks*."

Paragraph 7 is as follows :—

" Diluvion does not cause any difference in the *ala malkiyat* rights. So long as any field of an *adna malik* is only partially submerged and some of it remains, the *adna malkiyat* rights in it remain with the *adna malik*. If the whole of one number or holding is submerged, it becomes *shamilat deh*. The *adna malik* whose land is totally submerged, has a superior right to other owners to get from *banjar shamilat* or from land, which has re-appeared, an area equal to his submerged area, but he will have to pay *jhuri* at a rate not exceeding rupee one per acre. The *ala maliks* will have no power to refuse to accept *jhuri* for such land."

The meaning of these two paragraphs is fairly obvious. An *adna malik* retains his ownership over a number or holding which has been only partially submerged; if, however, his whole holding or a particular number is submerged (as happened in all these cases), it becomes *shamilat deh*. The *ala maliks* have a right to occupy *shamilat deh* and after them the *adna maliks*; but this is subject to the special right given to the *adna maliks*, whose land has been completely submerged, to get from existing *banjar shamilat* or from other land, which has re-appeared, areas equal to their

submerged area. For these new areas the *ala maliks* cannot refuse to take *jhuri* and the *adna maliks* are entitled to get possession and become *adna maliks* of the new areas by paying *jhuri*.

This view was accepted by Jai Lal J. in *Hayat v. Mohammad Khan* (1). In this case, however, no argument was raised that the payment of *jhuri* was a condition precedent to the *adna maliks* taking possession of the land which had emerged. This question came before the same Judge in Second Appeal No.597 of 1934 *Ghulam Mohammad v. Mohammad Khan*\* decided on the 23rd October, 1935, and he there held that as *jhuri* had not been tendered prior to the institution of the suit, the *ala maliks*, who sued for possession, were entitled to succeed. The same view has been taken by the learned Judge who decided the appeals in this Court, which are now before us on further appeal under the Letters Patent.

Evidence was produced by these *adna maliks* to prove that they offered to pay the *jhuri* which was refused by the *ala maliks* but this evidence has not been believed on the ground that it was interested. After all, in some of these cases which are before us, the *jhuri* amounted only to a few annas. The land was taken possession of a long time ago in 1924-25. No elaborate precautions would have been taken to see that outside witnesses were present so as to establish in suits, instituted nearly twelve years later, that the offer of a few annas was made to the *ala maliks*. In fact, the sums involved are so small that it is difficult to conceive that they were not offered whereas it was undoubtedly in the interests of the *ala maliks* to refuse them. Indeed, the *adna maliks* have alleged that

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(1) 1934 A. I. R. (Lab.) 561.

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they were always willing to pay. Be that as it may, the finding of the trial Court and the lower appellate Court is that it has not been established that *jhuri* was tendered and that finding must stand, though it was not to be expected that outsiders would have been present when such small sums were offered.

It remains, therefore, to determine the meaning of the *wajib-ul-arz* and we are clear that the *adna maliks*, whose land has been completely submerged, have a special right to get from existing *banjar shamilat* or from other land, which has emerged, areas equal to their submerged areas. Such land was taken by the *adna maliks* immediately after it re-appeared and though *jhuri* must be paid, there is nothing in the *wajib-ul-arz* which makes the payment thereof a condition precedent to the *adna maliks* taking possession of the land to which they are entitled. Of course, the *ala maliks* have a right to get the *jhuri* which the defendants are willing to pay. As there is nothing in the *wajib-ul-arz* which makes payment of the *jhuri* a condition precedent and, as it is in the interests of the *ala maliks* to refuse to take the *jhuri* so as to oust their inconvenient *adna maliks*, the only proper interpretation which should be placed on the *wajib-ul-arz*, taken as a whole, is that they are entitled to take possession as soon as they can and settle about the *jhuri* thereafter. If they had to settle about the *jhuri* first, the *ala maliks* would step in and seize the land themselves, or other *adna maliks* more in favour with the *ala maliks* would be given an opportunity to seize the land before the *adna maliks* not in favour with the *ala maliks*. Even the parties seem to have considered this the proper interpretation. Otherwise these suits would have been instituted at once and not so many years after.

For the reasons given above, we accept these appeals and dismiss all the suits but leave the parties to bear their own costs throughout.

A. K. C.

*Appeals accepted.*

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### APPELLATE CIVIL.

*Before Addison and Ram Lal JJ.*

MUL RAJ AND OTHERS (PLAINTIFFS) Appellants,

*versus*

TULSI RAM (DEFENDANT) Respondent.

1939

March 31.

First Appeal from Order No. 11 of 1939.

*Civil Procedure Code (Act V of 1908), S. 104 — Sch. II, Para. 17 — Private reference to arbitration — agreement to refer — filed in Court — Award made thereon — Court's order superseding the arbitration and stating that the proceedings had therefore become infructuous — such an order whether a decree and an appeal competent therefrom.*

There was a private reference to arbitration. The appellants made an application to the Senior Subordinate Judge under paragraph 17 (1) of the Second Schedule of the Civil Procedure Code that the agreement to refer should be filed in Court. The Senior Subordinate Judge dismissed the application and on appeal under s. 104 (1) (d) of the Civil Procedure Code the High Court remanded the case directing the filing of the agreement in Court. An award having been made by the arbitrators the Senior Subordinate Judge refused to make it a decree of the Court, holding the award to be bad and stating that he dismissed the petition under paragraph 17 of the Second Schedule of the Civil Procedure Code. The question was whether an appeal lay in the circumstances where the award was made through proceedings taken in Court.

*Held*, that the part of the order of the Senior Subordinate Judge that he dismissed the application under paragraph 17 of the Second Schedule was obviously wrong as that had already been done by him at a previous stage.