Privy Council Appeal No. 49 of 1916.

Dakas Khan and others - - - - *Appellants,*

v.

Ghulam Kasim Khan and others - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, NORTH-WEST FRONTIER PROVINCE, INDIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH FEBRUARY, 1918.

Present at the Hearing:

LORD BUCKMASTER.
SIR WALTER PHILLIMORE, Bart.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

In the district of Dera Ismail Khan there are two villages, Mauzah Darakki and Mauzah Sher Ali. Of the first the plaintiffs are the proprietors, of the second the defendants.

The dispute is between the proprietors of these two villages as to the ownership of village common lands measuring upwards of 7,989 acres. The plaintiffs contend that these lands belong to them jointly with the defendants in proprietary right by virtue of ownership of the two villages; the defendants maintain that they are the exclusive proprietors. There was a subsidiary question as to the omission of certain provisions from the Wajib-ul-arz relating to these common lands, but on this there is no longer any contest.

On the 10th May, 1912, the District Judge of Dera Ismail Khan decided on both points in the plaintiffs' favour. On the 13th January, 1913, this decree was varied by the Judicial Commissioner North-West Frontier Province, who dismissed the plaintiffs' claim of joint ownership. In other respects the decree was confirmed. It is from this variation in the appellate decree that the present appeal has been preferred by the plaintiffs.

The history of the land in suit is summed up in the following passage taken from the judgment of the Judicial Commissioner:—

"This land originally formed part of the hinterland of the Kundi village of Darakki. During the period that Nawab Sarwar Khan, of Dera,

held a vague authority in the district under the Sikhs, one, Mian Khan, a Kundi, obtained a Sanad authorising him to found a new village on the Darakki waste. He collected a group of colonists, consisting chiefly of Murats, and the village of Sher Ali was established. At the regular settlement (1874–78) the separate entity of Sher Ali was recognised by the authorities, and the persons actually holding land in the village were shown as owners in the Record of Rights."

Mian Khan was not an unwarranted intruder, entering on his new possession with a strong hand and with no sanction. He acted under the authority of the Nawab. And in this connection it is interesting and relevant to observe what Sir Henry Maine has to say of such matters :—

"The Native Indian Government," he writes, "sometimes claimed (though in a vague and occasional way) some exceptional authority over the waste; and acting on this precedent the British Government at the various settlements of land revenue has not seldom interfered to reduce excessive waste, and to reapportion uncultivated lands among the various communities of a district." ("Village Communities," p. 122.)

This is aptly illustrated at p. 38 of vol. II of "Tupper's Punjab Customary Law," where it is said :—

"Nawab Muhammad Khan, Sddaozai, Governor of the province of Dera, gave a great impulse to Beloch immigration. Without much regard to the claims of the old *hud* proprietors, he allotted waste lands to anyone who would found a village."

It is principally by reference to the settlement of 1874–78 that the dispute between the litigants has to be determined.

There are certain matters that are beyond controversy Thus it is clear (*a*) that though what is now Mauzah Sher Ali was at one time a part of Mauzah Darakki, it was at the date of the settlement, and still is, a separate and distinct village, and (*b*) that the lands in suit are within the boundaries of Mauzah Sher Ali.

At the same time it is apparent from the Revenue proceedings which led up to the Wajib-ul-arz of 1878 that in adjusting the rights in these lands regard was had to the origin and history of Mauzah Sher Aii, and it was a part of the scheme of adjustment that the claims of the parent Mauzah should be recognised. The settlement officer responsible for the Robkar of the 5th February, 1876, recorded the opinion that it was fair and proper that the waste land should be entered as the joint property of the village Sher Ali and Mauzah Darakki. But from the earlier part of this document it would seem that what was in the settlement officer's contemplation was that the zamindars of Darakki should have equal rights with the cultivators of the Murat tribe to break up the waste lands of Mauzah Sher Ali.

The next document that calls for notice is the Shajra Nasb, or genealogical tree. The whole of it is not on the record but only section 1, which is, in effect, a narrative of the origin and development of Mauzah Sher Ali. It is there stated that: "The

proprietors of Sher Ali and Darakki villages were held as *malikan qabiz* (proprietors in possession) of 7,989 ghumaoan 6 kanals 14 marlas of Shamilat land." It has been urged that this supports the appellants' case, and much has been made of the expression *malikan qabiz*. But here their Lordships are confronted by an initial difficulty. In the official translation of this document, Exhibit No. 25, there is no sort of indication that this statement as to proprietorship was derived from or based on the terms of the Wajib-ul-arz; but in his judgment the District Judge renders this part of the document in these words:—

"According to paragraph 14 of the Wajib-ul-arz 7,789 ghomaos 6 kanals 14 marlas of land was held to be the Shamilat property of the proprietors of Mauzas Darakki and Sher Ali."

Which of these renderings is the more correct their Lordships have no means of judging, and their difficulties in this respect are enhanced as the appeal has been heard *ex parte*. Yet there is a vital and obvious difference between their effect for the purpose in hand. In the one there is what purports to be an independent statement of the rival rights; in the other there is a statement which is merely the interpretation placed on paragraph 14 of the Wajib-ul-arz. Nor do the difficulties end there. The expression *malikan qabiz* is a term of art used for the purpose of settlement proceedings, and before its value as an indication of any group of rights or their quality can be justly appreciated its precise signification in this context should be known. And here again their Lordships have been left without such assistance as would justify a decisive pronouncement on the point. That the expression may bear a meaning that would not advance the plaintiffs' case may be reasonably inferred as a possibility from a passage to be found at p. 150 of Boulnois and Rattigan's "Customary Law." But, when all is said and done, the statements of these documents were not immutable, and the determination of this case must depend on the interpretation to be placed on the Wajib-ul-arz or Record of Rights in which the final result of the settlement proceedings was recorded.

A record of rights has been described by Sir Henry Maine as a detailed statement of all rights in land drawn up periodically by the functionaries employed in settling the claims of the Government to its shares of the rental ("Village Communities," p. 72). He adds that—

"The most important object of the settlement operations—not second even to the adjustment of Government revenue—is to construct a record of rights, which is a detailed register of all rights over the soil in the form in which they are believed to have existed on the eve of the conquest or annexation."

The authority of such a document is universally recognised, and in *Musammat Lali* v. *Murli Dhar*, L.R. 33 I.A., at p. 101 it was said:—

"The term Wajib-ul-arz in the North-Western Provinces is applied to what is considered to be the most important document contained in the official records relating to the village administration."

Though it does not create a title, it gives rise to a presumption in its support, which prevails until its correctness is successfully impugned.

Had the opinion expressed in the Robkar been reproduced in the Wajib-ul-arz, and had the villagers of Darakki been entered there as owners jointly with the "proprietors of Murat tribe," it might well have been contended that the plaintiffs' title was impregnable. But this was not done, and an examination of the Wajib-ul-arz shows that it was a far more complete and exhaustive adjustment of rights than the outline sketched in the proposals of the Robkar.

It will be found that the proposed rights of cultivation and grazing are carefully safeguarded. And though the method employed may not have followed literally that contemplated by the author of the Robkar, it calls for no great ingenuity to guess how, on balancing expediencies and reckoning up the advantages, it may have been felt, when the final word came to be said, that the conflict of claims could be best reconciled and most conveniently arranged by bestowing the inferior rights of enjoyment on both villages alike, but securing the superior right of proprietorship, with its obligations to the Government, exclusively to the village in which the lands were situated, and of which they formed a part for the purposes of Revenue administration.

The only sections of the Wajib-ul-arz disclosed in the Record are the 14th and the 17th, and on their true construction they do not (in their Lordships' opinion) support the contention that their legal effect was that for which the appellants contend. Section 14 draws a sharp distinction between the superior right of proprietorship of the village common lands and the inferior right of bringing them under cultivation and of grazing cattle. The superior right is recorded as belonging to the proprietors of the Murat tribe, or, in other words, the proprietary body of Mauzah Sher Ali, and the inferior right as vested in the Khewatdars of both Mauzahs. Section 17, after dealing with the cultivation of the village common land and the revenue to be paid, provides that the income is to go to the revenue of Mauzah Sher Ali, and not to Darakki. The learned Judicial Commissioner, in holding that the defendants' title had the sanction of the Revenue Records, attributed great importance to this provision as to the revenue, and their Lordships do not think he exaggerated its significance when he described it as marking the true proprietorship of the waste lands. Indeed, counsel was unable to point to any other circumstance in the case as a mark of proprietorship which was not equally, and even preferably, referable to the inferior right of cultivation and grazing bestowed on the villagers of the two Mauzahs.

This view as to the meaning and effect of the Wajib-ul-arz has not been held by the Judicial Commissioner alone. In the report of Mr. S. Mulaim Din. Tahsildar Tank, dated the 3rd July, 1894, it is said that the names of the Darakki people are not shown in the column of proprietorship in the settlement and the Jamabandi files, but it is shown as village Shamilat of the proprietors of Sher Ali. And this opinion is repeated in the Commissioner's order of the 20th May, 1895. These views are of value, as Revenue officers would be intimately conversant with topics of this kind.

Nor do the difficulties in the appellants' way rest there, for the subsequent treatment of the lands lends no small support to the view expressed as to the legal effect of the Wajib-ul-arz.

To begin with, the revenue of the lands has actually been received and dealt with according to the provisions of section 17. Then, again, from 1878 onwards the lands have been consistently shown in the official records as the Shamilat Deh of Mauzah Sher Ali. The appellants seek to escape from the obvious inference this invites by the suggestion that this entry merely indicated the situation of the land within the bounds of Mauzah Sher Ali, and was in no sense a token that the proprietorship belonged to that village. This attempted explanation leaves their Lordships unconvinced.

And it is not as though there was this entry in the records and nothing more. The Darakki claim to proprietorship has been repeatedly and consistently challenged. As far back as 1883, the learned Judicial Commissioner declares, the plaintiffs' rights were definitely traversed. Then, from Mr. Bruce's order of the 20th May, 1895, it is apparent that the villagers of Sher Ali at that time asserted that the Darakki village had no proprietary rights in the land and denied the Darakki title. Again in 1900 this denial was repeated. And yet it was not until the institution of this suit on the 23rd of March, 1909, that the plaintiffs attempted to vindicate their claim in a court of law, though long before this the urgent necessity of such action had been pressed on them. It would be wrong to treat all this as of no moment. Apart from any bar of limitation which this delay may entail, the reluctance, or, at any rate, prolonged failure, of the Darakki villagers to assert their claim in the Civil Courts, whether due to a lack of confidence in its merits or not, imposes on their Lordships the clear and imperative duty of cautious reserve before accepting the appellants' contention that the decree adverse to their claim should be reversed. And the need for this reserve is the greater as this case with its difficulties and peculiarities has come before this Board in the absence of anyone to present the defendants' case.

But, in truth, so far from being convinced that the decree under appeal is erroneous, their Lordships consider it to be amply supported by a judgment which is well reasoned and well

founded ; and they certainly are not prepared to dissent from the Appellate Court's conclusion that the plaintiffs' claim to joint ownership has failed.

Nor do their Lordships differ from that Court's decision that the plaintiffs' claim to a declaration of joint ownership is barred by limitation, though in the view they take this aspect of the case calls for no elaboration.

The Judicial Commissioner has affirmed so much of the First Court's decree as declared clause 14 of the Wajib-ul-arz to be still operative, but it follows from what he had previously determined that its legal effect would be in accordance with his view and not that of the First Court as to its true interpretation. The rights thus secured to the plaintiffs are not of as high a degree as they claimed, yet they are probably substantial. Any attempt, however, at a definition of them would be outside the scope of this appeal, for the determination of their meaning, as the Judicial Commissioner has indicated, is more a matter for the Revenue authorities, should the occasion ever arise.

The result, then, is that their Lordships will humbly advise His Majesty that this appeal be dismissed, but without costs, as the respondents have not appeared.

In the Privy Council.

DAKAS KHAN AND OTHERS

v.

GHULAM KASIM KHAN AND OTHERS.

DELIVERED BY

SIR LAWRENCE JENKINS.

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