PETITIONER:
CHHOTE KHAN, DECEASED, REPRESENTED BY HIS SON, HARMAT, AND

Vs.

RESPONDENT:
MAL KHAN AND OTHERS.

DATE OF JUDGMENT:
21/04/1954

BENCH:
HASAN, GHULAM
BENCH:
HASAN, GHULAM
DAS, SUDHI RANJAN
JAGANNADHADAS, B.

CITATION:
1954 AIR 575 1955 SCR 60

ACT:
Wajib-ul-arz-Entry regarding agreement therein-Whether holds good after the expiry of period of Settlement.

HEADNOTE:
Held, that an entry regarding agreement in a Wajib-ul-arz holds good during the currency of the Settlement and does not survive the expiry of the period of Settlement.
Hira and Others v. Muhamadi and Others (16 P.R. 1915 at P. 89), Allah Bakhsh and Others v. Mirza Bashir-ud-Din and Others (1932 L.T.R. 56) and Lieut. Chaudhri Chattar Singh v. Mt. Shugni and Another (A.I.R. 1941 Lah 239) referred to.

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 61 of 1951.
Appeal from the Judgment and Decree dated the 10th November, 1944., of the High Court of Judicature at Lahore in Civil Regular First Appeal No. 259 of 1942, arising out of the Judgment and Decree dated the 29th July, 1942, of the Court of the Extra Assistant Settlement Officer and Assistant Collector of the
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First Grade as Senior Sub-Judge, Gurgaon, in Suit No. 35 of 1940-41.
Dr. Bakshi Tek Chand, (Ram Nath Chadha and Ganpat Rai, with him) for the appellants.
Naunit Lal for respondents Nos. 1, 3, 7 to 11 and 13 to 19.
1954. April 21. The Judgment of the Court was delivered by GHULAM HASAN J.-This appeal is brought against the judgment and decree dated November 10, 1944, of the Lahore High Court (Sir Trevor Harries C. J. and Mr. Justice Mahajan, the present Chief Justice of this Court) reversing the judgment and decree of the Assist,ant Collector, First Grade, Gurgaon, as Senior Subordinate Judge, and dismissing the plaintiffs-appellants' suit.
Dalmir, Dilmor and Chhinga were three brothers and Amir Khan and Sharif Khan were the two collaterals. Alif Khan was the son of Amir Khan. The present dispute is between the

descendants of the five branches of the family.
The suit was brought by the descendants of Dalmir against the descendants of Dilmor, Cbhinga, Alif Khan and Sharif Khan. To this suit were also impleaded as defendants some of the descendants of Dalmir. The plaintiffs claimed a declaration that they along with defendants Nos. 17 to 19 are full owners in possession of 819 Bighas 19 Biswas land situate in village Manota Tehsil Ferozepore Jhirka. in the Gurgaon District, that the defendants Nos. I to 16 had no right to claim partition of that land and that they were entitled only to the produce of land measuring 140 Bighas 19 Biswas possessed by them without payment of land revenue. The aforesaid defendants, it was alleged, were bound by the terms embodied in the agreement dated September II, 1861, in the Wajib-ul-arz of that Settlement and repeated in subsequent Settlements which debarred them from any right to. claim partition. Defendants Nos. I to 16, who are the contesting defendants, pleaded in defence that the plaintiffs along with the pro-forma defendants Nos. 17 to 19 were recorded in revenue
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papers as owners of 1/5th share in the land in dispute, while the contesting defendants were recorded as owners of the remaining 4/5th share and as such they were entitled to claim partition. The defendants denied that any agreement or condition in the Wajib-ul-arz restricting their right to partition was binding after the expiry of the term of the Settlement and contended that it could not operate as a bar to their claim to partition. The Assistant Collector trying the suit as a Civil, Court under section 117 of the Punjab Land Revenue Act (Act XVII of 1887) decreed the claim. He held that the contesting defendants were entitled only to get produce of 140 Bighas and 19 Biswas of land in their possession without payment of land revenue and had no interest in the remaining land. This decree was reversed on appeal, the High Court holding that the defendants are entitled to 4/5th share as proprietors, that the original agreement repeated in subsequent Settlements was binding on the parties so long as the Settlements were in force, that it ceased to have any effect after the expiry of the Settlements and that the renewal of its terms in the Settlement of 1938-39 was not binding as they were not agreed to by the contesting defendants. The learned Judges held that the judgment (D. 4) dated June 15, 1893 of the Chief Court of Punjab inter-parties, which held that the prohibition of partition contained in the Wajib-ul-arz did not survive the expiry of the period of the Settlement, was binding upon them. They took the view that the contesting defendants being. proprietors, the right of partition was inherent in their right of ownership. As a result of these findings the suit was dismissed.
We have heard Dr. Tek Chand, learned counsel for the appellants, in support of the appeal at length but we are of opinion that there is no force in the appeal.
The parties are Meos and the land in dispute is situate in village Manota in Tehsil Ferozepore Jhirka in Gurgaon District. According to the Gazetteer of Gurgaon District (1910) the Meos owned nearly the whole of the Ferozepore Tehsil and various other villages in Gurgaon. They are divided into several sub-tribes, and these sub-tribes possess a strong feeling of unity and the
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power of corporate action. It was stated that " in the mutiny the members of each sub-division generally acted together; and district officers are advised to keep

themselves informed of the names and characters of the men, who from time to time possess considerable influence over their fellow-tribesmen." (P. 60).

The documentary evidence regarding the title to the property in dispute ranges over a period of four Settlements, each Settlement being for a period of thirty years. The first Settlement was made in 1839-42, the second in 1872-1879, the third in 1903-08 and the last in 1938-39 which is the current Settlement. The village was assessed to annual revenue of Rs. 323 for the, period of 30 years from 1246 to 1275 Fasli (corresponding to 1839-1862 A.D.) which was made payable by Dalmir Lamberdar who is described as sole owner. The Settlement papers were, however, lost during the mutiny and after taking fresh measurements the settle-: ment papers were completed. Alif Khan, Dalmir and Dilmor signed what is called an agreement binding them by all conditions, provisions and declarations made at the time of the Settlement (P. 12).

It is common ground that the property was originally, granted in 1822 A. D. to Dalmir by Nawab Ahmad Bakhsh Khan Rais of Ferozepore Jhirka. The grant is not in writing and there is no contemporaneous record which could throw any light on its terms. Dalmir claimed to be the sole grantee with full proprietary rights. A number of documents are attached to the Settlement record of 1863. They are important as showing how the property was dealt with by the Settlement authorities from time to time and the state of the revenue records. The earliest document on record appe-ars to be an agreement dated September 28, 186 1, which is incorporated in paragraph 18 of the Wajib-ul-arz of village Manota. It says that the tenure of the village is zamindari. Dalmir is entitled to profit and liable for loss in respect of the entire village. The other biswadars are owners of the produce of the land cultivated by them but they pay no revenue. This, it is stated, is the benefit they enjoy (P. 35 = D. II). This document is signed in token of verification by Dalmir Lamberdar,

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Dilmor, Alif Khan Biswadar and Phusa Biswadar, who ,ire described as proprietors. Phusa, we are told, is the alias of Chhinga. There is a report of Mr. John Lawrence (later Lord Lawrence), Settlement Officer referred to in the Gazetteer, which says that the arrange ment then in vogue was that a few owners shared the profit and loss of the land revenue and the others were exempted from responsibility. Manota was one of the few villages which continued to follow the system (P. 179).

Paragraph 2 of the Wajib-ul-arz which relates to the mode of partition, after stating the area of the village as 837 Bighas and 9 Biswas, says "When we, the co-sharers want to partition it, we ourselves will do so of our accord in accordance with our shares shown in the Khewat papers or through the village Patwari in the,presence of Panchayat of the brotherhood. The new abadi (cultivation of new land) will be made with the consent of all the biswadars. One biswdar is not competent to make a new abadi". D. 10).

P. 4 is a statement showing apportionment of Jama, (i.e., Khewat money) in the village. After stating that the Settlement of the village was made in the name, of Dalmir, sole owner, and that he alone was entitled, to profit and liable for loss, it goes on to say that Alif Khan son of Amir and Phusa son of Chhinga and Dilmor having cultivated a specified area of land be. came owners of the produce of the land without payment of rent and also became entitled to profit and liable for loss.

Paragraph 10 of the Wajibul-arz contains an agreement about trees. It shows that the trees standing in the house or field of the owner belong to him, and he is competent to plant and cut them. So far as the occupancy tenants are concerned, the trees standing in their houses also belong to them as they cultivate -land but Dalmir alone had the right to cut or sell them. These are all the material documents pertaining to the Settlement record of 1863.

We now come to the Settlement record of 1877,

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P. 17 is an important document. Paragraph I which deals with the history of the village is reproduced below:-'

"Fifty-two years ago in Sambat 1880, Dalmir, Caste Meo, Got Sogan, along with Dilmor and Chhinga, his real brothers, took possession of the area of this village, with the permission of Nawab Ahmed Bakhshi Khan Sahib. Rais of Ferozepore, who granted him a Biswadari estate without payment of any Nazrana in lieu of the services rendered by him and made this desolate, tract abad. He along with his brothers jointly remained in possession thereof and enjoyed profit and bore loss. After him Amir Khan became abad in the village and along with us, proprietors, remained in possession. Accordingly, we the proprietors got his name, entered as a Biswadar at the time of the Revised Settlement. After him Sharif Khan, son of Ghariba, who was also a collateral, came to this village in Sambat 1916 and remained in possession along with us proprietors. Accordingly we got his name also recorded along with ours on the 14th September, 1863. We have up to this day been joint owners. This village has never been partitioned. Shares are given in the Khewat papers.,"

This document shows that although the name of Dalmir is mentioned as being the sole grantee by virtue of the services rendered by him to the Nawab, his two brothers also were in joint possession with him. Not only this but Amir Khan and Sharif Khan, who are both collaterals, also had joint possession of the village. They are all described as proprietors and their names are recorded as joint owners. The authenticity of this documentisbeyondquestion. It out sat the root of the theory of Dalmir being the sole owner. It is true that Dalmir was mentioned as the sole owner in D. 4 but the grant was treated by Dalmir himself as being the joint property of his two brothers and the two couaterals whether or not it was originally intended for the benefit of the family as understood in its widest sense.

Paragraph 5 of the Wajib-ul-arz relating to the tenure of the village and the mode of payment of revenue

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says that the village is bilijmal (joint) and that the sons of Dalmir shall continue to pay the Government revenue in respect of their own shares as well as the shares of the sons of his two brothers and the shares of the collaterals. The reason given is that no money is taken from the said co-sharers on account of relationship. (P. 15). This statement is consistent only with joint ownership.

Paragraph 7 of the Wajib-ul-arz also describes the tenure as Zamindari bilijmal and Repeats the statement that the other co-sharers of Dalmir do not pay any rent or Jama in respect of the land cultivated by them on account of their relationship. No single sharer has the right to reclaim the Banjar area without the consent of all the proprietors (P. 19). This Wajib-ul-arz is verified by the proprietors, tenants, Bhandadars (a village servant to whom cultivation is allotted rent free), Kamins (menials) and the inhabitants

of the village. It is admittedly signed by the ancestors of the parties (P. 22).

The Khewat and the Khatauni (P. 31) prepared during the Settlement both record the five branches of the family as being in possession of a 1/5th share each. A similar entry is to be found in the Khatauni (D. 18).

It appears that during the currency of this Settlement two suits for partition were filed in the Revenue Court but the partition was not allowed (P. 5).

Coming to the Settlement of 1903-08 we find a Statement in clause 3 of the Wajib-ul-arz (D. 13) that the descendants of Dalmir alone could get the land partitioned in five equal shares but the descendants of the other four co-sharers, who were, cultivating land without payment of revenue, owing to non-rendition of account in respect of profit and loss of their respective shares, could not have the land partitioned. ,

Lastly we come to the Jamabandi of 1937-38 (P. 1). This shows that all the five branches were entered as being in possession of equal shares.

Mehrab, grandson of Dalmir and one of the plaintiffs, who gave evidence as P. W. 5 admitted that defendants

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Nos. I to 16 were shown as proprietors in the Jamabandi but he never raised any objection to it. He also admitted that Mehar Singh, grandson of Sharif Khan, sold his half share to Chhote Khan and Bhola, his coplaintiffs and that they did not challenge the same.

We may now refer to the civil litigation which started in 1891. It arose upon the rejection of the applications for partition made by Alif Khan and Sharif Khan on September 24, 1890, by the Assistant Collector. Alif Khan filed a suit against the descendants of the three brothers and the descendants of Sharif Khan. In the plaint (D. 1) he claimed a declaration of 1/5th share of the entire village. The sons of Dalmir denied the claim. In their written statement (B. 2) they alleged that in previous proceedings they had deniedthe plaintiffs' right to partition and that the defendants had been in adverse possession of the land and that the plaintiffs and others had been cultivating land as Bhandadars (village servants). The Subordinate Judge decreed the claim (D. 3). This decree was upheld by the Divisional Judge, but the judgment is not on record. In second appeal the Chief Court amended the decree by declaring that the plaintiff was entitled to 1/5th share in the village to be enjoyed subject to the qualifications and restrictions set forth in the Khewat and the Wajib-ul-arz which do not permit of his obtaining partition while the present Wajib-ul-arz was in force. This decree was made upon the admission made by the defendants in the course of the arguments. Paragraph 8 of the Wajib-ul-arz of 1877 (D. 12=p. 16) which was the subject of conflicting interpretation by the parties was interpreted by the Chief Court to mean that its effect was to prohibit general division among the co-sharers while the Wajibul-arz was still in force. They held that the five sons of Dalmir could separate their shares inter se but not the other co-sharers. We are of opinion that this judgment which is inter-partes finally set at rest the controversy between them by declaring that the parties were joint owners holding equal shares and constitutes res judicata. The judgment is also in conformity with the true effect of the documentary evidence on the

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record. No doubt the name of Dalmir was entered. in some

documents as the sole owner but that entry by itself is not conclusive and must be read in conjunction with the other entries in the Settlement record. Dalmir may have been the original grantee but his own conduct shows that he did not regard himself as absolute owner to the exclusion of his own brothers. Indeed according to the entry he even treated his collaterals on an equal footing. His description as sole owner in the circumstances carries no value. Whatever may have been the position at the time of the original grant, the subsequent conduct of the parties unmistakably shows that all the five branches were treated as owners in equal shares. Dalmir as the lamberdar was made responsible for the payment of the entire landrevenue. He was -entitled to profit and was responsible for loss. The others were given less land and were exempted from payment of rent or revenue on account of relationship. This arrangement appears to have been fairly general in those days as appears from the report of Mr. (later Lord) Lawrence, Settlement Officer, referred to above. The arrangement was that' a few owners shared the profit and loss of the land revenue assessment while the others were exempted. The Government was primarily interested in the payment of the revenue and they apparently found it more convenient to hold the head or the most influential member of the family as responsible for payment of the entire revenue leaving it to him to make such arrangement among his co-sharers as he thought fit. In later Settlements the owners accepting responsibility for the payment of the land revenue did not find it profitable and the system gradually disappeared. Lord Lawrence remarks that at the third Settlement the number of villages which still continued the system was reduced to three and one of these was Manota in Ferozepore Tehsil (page 179). This accounts for Dalmir being called the sole owner and being made responsible for payment of Government revenue.

By section 44 of the Punjab Land Revenue Act an entry made in the record of rights or in an annual record shall be presumed to be, true until the contrary

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is proved. That entries in the Jamabandies fall within the purview of the record of rights under section 31 of the Act admits of no doubt. Section, 16 of the old Act (XXIII of 1871) laid down that entries in the record of rights made or authenticated at a regular Settlement shall be presumed to be true. We are satisfied that the materials on the record taken as a whole justify the view which has been taken by the High Court that the contesting defendants are joint owners and not mere cultivators who are not entitled to claim partition of the property. The judgment of the Chief Court also recognized the proprietary right of the defendants but qualified it by the declaration that so long as the Settlement was in force, they were not entitled to partition by reason of their agreement recorded in the Settlement papers. The Settlements of 1877 and 1908-09 have ceased to operate and the entry in the current Settlement of 1938-39 having been made under the orders of the Collector has no value when the contesting defendants did not agree to its being incorporated. The previous agreement was not one for perpetuity but for a limited period only and there is no reason in law why the prohibition against partition should be now enforced against the contesting defend. ants. It has been held in a number of cases that the entry regarding agreement in a Wajib-ul-arz holds good during the period of the Settlement in which it is made and becomes inoperative when the Settlement has come to an end: Hira and others v. Muhamadi and Other8 (1); Allah Bakhsh and Others. Mirza

Bashir-uddin and Others (2) and Lieut. Chaudhri Chattar Singh v. Mt. Shugni and Another (3).

We agree with the High Court in holding that partition is a right incident to the ownership of property and once the defendants are held. as co-owners, their right to partition cannot be resisted.

It was contended by Dr. Tek Chand that the appellants had acquired title by adverse possession over the defendants' share for more than 56 years. This plea was raised in the plaint but evidently it w as not pressed

(1)16 P.R. 1915 (P. 89).

(2)1932 LIT.Rn. 56.

(3) A.I.R. 194 Lah. 239.

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for no issue was framed, nor any finding recorded by the trial Court. This point is not taken even in the grounds of appeal to this Court. The plea has no substance and was rightly rejected by the High Court on the ground that possession was under an arrangement between the co-sharers. and no question of adverse possession could arise under the circumstances.

We hold that there is no force in this appeal and dismiss it with costs.

Appeal dismissed.