LETTERS PATENT SIDE.

Before Bhandari, C. J. and Bishan Narain, J.

JAGIR SINGH AND OTHERS.- *Plaintiffs-Appellants*

versus

NARAIN SINGH, ETC.,—*Defendants-Respondents*

Letters Patent Appeal No. 89 of 1950

1954

May, 27th

Custom—Ramuwala Village in Moga Tehsil of Ferozepore District—Whether occupancy tenants entitled to a share in Shamilat along with the proprietors of the Village—Special Custom—Whether proved—Wajib-ul-Arz—entries in—value of—Judicial decision in contested cases—Evidentiary value of, as to existence of Custom—Shamilat deh—Meaning of.

Held, that the *shamilat deh* is a plot of uncultivated waste land in every village reserved for the purposes of common pasture, for assemblies of the people, for tethering of the village cattle and for a possible extension of the village dwellings. As a general rule it is regarded as a common property of the original settlers and their descendants and it follows as a consequence that the proprietors alone can claim partition of the *shamilat deh*.

Held, that although ordinarily the proprietors of the village, (*malikan deh*) as distinguished from proprietors of their own holdings (*malikan maqbuza khud*) are entitled to a share in the *shamilat deh*, a special custom exists in Village Ramuwala of the Ferozepore District according to which not only the proprietors but also the occupancy tenants are entitled to a share in the village *shamilat* as stated in paragraphs 4 and 5 of the Wajib-ul-Arz of this village.

Held, that a Wajib-ul-Arz is an official record of the local customs prevailing amongst the various tribes of the village or the estate to which it relates. It is prepared by public servants in the discharge of their official duties and is *prima facie* evidence of the customs stated therein. The presumption raised by it is a rebuttable one and may be overthrown by any one disputing it by showing that the entry is inconclusive or erroneous or is contradicted

by instances or is opposed to the universal law and justice or has been made from interested motives or that it is not a correct statement of the custom as it exists but a statement of the custom as it ought to be.

Held, that when a judicial decision in a contested case is based upon specific instances in which the alleged custom was acted upon and is in consonance with the entries in the Riwaj-i-Am or Wajib-ul-Arz, it furnishes excellent evidence in regard to the existence of the Custom.

Letters Patent Appeal under clause 10 of the Letters Patent from the decree of Mr. Justice Harnam Singh, of the High Court of Punjab at Simla, dated the 13th July, 1950, reversing that of Shri *S. L. Madhok, Additional District Judge, Ferozepur, dated the 28th February, 1947, affirming that of* Shri *M. Saleem, Sub-Judge, II Class, Moga, dated the 21st January, 1946. and dismissing the plaintiff's suit with costs throughout.*

K. L. GOSAIN, for Appellants.

H. L. SIBAL, for Respondents.

JUDGMENT

Bhandari, C. J. BHANDARI, C. J. The only point for decision in this present appeal is whether the occupancy tenants of Village Ramuwala of the Ferozepore District are entitled to a share in *Shamilat* Patti Jaimal along with the proprietors of the village.

The plaintiffs in this case are occupancy tenants in Village Ramuwala of Moga Tehsil of the Ferozepore District, while the defendants are proprietors in the said village. It appears that one Mst. Chando, an occupancy tenant of a plot of land measuring 230 *kanals* 7 *marlas*, died without heirs in the year 1933 and her occupancy rights devolved on the proprietors of the village in accordance with the provisions of the Punjab Tenancy Act. On the 14th December 1944 the plaintiffs brought a suit for a declaration that they

were entitled to half the land which had been left by Mst. Chando and for an injunction restraining the defendants from interfering with their right to have the land partitioned. The trial Court granted a decree in favour of the plaintiffs and this decree was upheld by the learned Additional District Judge on appeal. A learned Single Judge, however, came to a contrary conclusion. He held that as a general rule only proprietors of the village are entitled to a share in the *shamilat deh* and that the plaintiffs in the present case, who are occupancy tenants, have failed to establish that they are governed by a special custom which is at variance with the general law of the Province and which entitles them to a share in the *shamilat* along with the proprietors of the village. The tenants have preferred an appeal under clause 10 of the Letters Patent and the question for this Court is whether the learned Single Judge has come to a correct determination in point of law.

Paragraph 224 of Rattigan's Digest of Customary Law is in the following terms:—

> "224. As a general rule, only proprietors of the village (*malikan deh*) as distinguished from proprietors of their own holdings (*malikan makbuza khud*) are entitled to share in the *shamilat deh*."

The *shamilat deh* is a plot of uncultivated waste land in every village reserved for the purposes of common pasture, for assemblies of the people, for tethering of the village cattle and for a possible extension of the village dwellings. As a general rule it is regarded as a common property of the original settlers and their descendants and it follows as a consequence that the proprietors alone can claim partition of the *shamilat deh*.

Jagir Singh and others
v.
Narain Singh, etc.

Bhandari, C. J.

The plaintiffs claim that the general custom as embodied in paragraph 224 cited above has been varied as far as they are concerned by a special custom according to which not only the proprietors but also the occupancy tenants are entitled to a share in the village *shamilat*. They place reliance on the following facts and circumstances in support of this claim namely:—

(1) entries in clauses 4 and 5 of the *wajib ul-arz* of 1853;

(2) certain partitions of *shamilat deh* in the years 1884 and 1893 in which the occupancy tenants received their share of the *shamilat*;

(3) certain judgments delivered in cases relating to neighbouring villages in which similar entries in the *wajib-ul-arz* were construed in favour of occupancy tenants; and

(4) certain observations in Rattigan's Digest of Customary Law from which it appears that although as a general rule the *shamilat deh* is regarded as the common property of the original settlers and their descendants, there are cases in which those who assisted the settlers in clearing the waste and bringing it under cultivation are recognised as having a share in it.

Paragraph 4 of the *wajib-ul-arz* of this village which was prepared in the year 1853 and which deals with rights of occupancy and non-occupancy tenants is in the following terms:—

"In our village the occupancy tenants enjoy all the rights like those of proprietors with the exception of the right of alienation of land in their possession

* * * * *"

If the occupancy tenants enjoy all the rights like those of proprietors (other than the right to alienate the land in their possession) it is obvious that they have the same right to a share in the village *shamilat* as the proprietors themselves have.

Paragraph 5 of the *wajib-ul-arz* which deals with the rule of partition of *banjar* land declares that the land of *shamilat deh* and the *shamilat patti* (with certain exceptions which are not relevant for the purpose of this case) is partible with the consent of the majority according to the shares defined in paragraph 1 of the *wajib-ul-arz* and that the occupancy tenants of the *shamilat* are entitled to have their shares out of the *shamilat*. The learned counsel for the defendants contends that as the express mention of one thing implies the exclusion of another the express mention of the fact that the rule regulates the partition of *banjar* land appears to indicate that occupancy tenants can claim a share only in the uncultivated waste land and not in land which is under cultivation. This contention appears to be wholly devoid of force. In the first place, the documents of the year 1882—1884 and 1893 to which a reference will be made in succeeding paragraphs make it quite clear that on at least two occasions both the proprietors and occupancy tenants agreed willingly and of their own accord to partition portions of the village *shamilat* a part of which was barren and a part of which was under cultivation. Secondly, according to the judgment of Rattigan, J., in case No. 232 of 1910, in which a similar provision in the *wajib-ul-arz* of a neighbouring village came up for consideration, occupancy tenants have a share in the whole *shamilat* and not only in the uncultivated waste land. The learned Judge observed as follows:—

> "The learned Divisional Judge, while recognising the force of this entry in favour of plaintiffs, argues that clause (5) of the

Jagir Singh and others v. Narain Singh, etc.

Bhandari C. J.

wajib-ul-arz must be restricted to waste areas alone and cannot be applicable to holdings such as that in dispute. I confess I cannot follow the argument, when (as here) we find the *shamilat deh* (as defined in the entry) recorded as the proprietor not of mere waste land but of a specific holding. The learned Judge, however, thinks that 'it would be a contradiction in terms to hold that an occupancy tenant could hold under the proprietary body and the other occupancy tenants in the village, himself included'. I fail myself to see any anomaly in this. On the contrary it is a matter of common knowledge that in the case of villages owned by a number of persons jointly, parts of the *shamilat deh* are occupied for the time being by one or other of the joint-owners and that in one sense the latter must, *qua* such areas, be regarded as tenants of the whole proprietary body, themselves included."

Entries in paragraphs 4 and 5 of the *wajib-ul-arz* of this village are *prima facie* evidence of the fact that occupancy tenants of this village are governed by a special custom according to which they as well as the proprietors are entitled to a share in the *shamilat* of the village. A *wajib-ul-arz* is an official record of the local custom prevailing amongst the various tribes of the village or the estate to which it relates. It is prepared by public servants in the discharge of their official duties and is *prima facie* evidence of the customs stated therein. The presumption raised by it is a rebuttable one and may be overthrown by any one disputing it by showing that the entry is inconclusive

or erroneous or is contradicted by instances or is opposed to the universal law and justice or has been made from interested motives or that it is not a correct statement of the custom as it exists but a statement of the custom as it ought to be. The presumption raised by the *wajib-ul-arz* in the present case has not been rebutted by any of the above facts or circumstances.

On the other hand the presumption has been strengthened by the fact that the special custom embodied in paragraphs 4 and 5 of the *wajib-ul-arz* has been acted upon, and the right of occupancy tenants to a share in the *shamilat* recognised, on at least two separate occasions. In or about the year 1882 the proprietors and occupancy tenants who claimed to be co-sharers of *shamilat* Patti Jaimal applied to the Revenue authorities for the partition of a part of the *shamilat* which consisted of land which was *banjar* and land which was under the cultivation of owners and occupancy tenants. On the 11th May 1882 the applicants appeared before the Naib-Tehsildar and stated that they had agreed to the land being partitioned. Some of the co-sharers wanted the partition to be made in accordance with the number of ploughs and the others in accordance with the revenue assessed but all were agreed that the land should be partitioned and that the occupancy tenants were entitled to a share in the *shamilat* (*vide* Exh. P. 22). On the 10th June 1882 the Naib-Tehsildar submitted a report in which he stated that all the co-sharers were agreeable to the partition and recommended that partition should be effected in accordance with the number of ploughs (Exh. P. 19). On the 28th April 1884 the Naib-Tehsildar ordered the partition of the land as all the proprietors and occupancy tenants were agreeable to the partition and as according to the *wajib-ul-arz* prepared at the time of the

Jagir Singh and others
v.
Narain Singh, etc.

Bhandari, C. J.

settlement all the land of *shamilat* Patti, other than *banjar* land and land acquired by Government on payment of compensation, could be partitioned among the owners, occupancy tenants and *khewatdars*. In the concluding portion of the order he observed as follows:—

> "As this partition has been effected with the consent of all the co-sharers none of them is displeased therewith, nor does he raise any objection in respect thereof (*vide* Exh. P. 13)."

The second instance is furnished by certain orders which were passed by the Revenue Officers on an application for partition of another plot of land which also formed part of *shamilat* Patti Jaimal. On the 16th July 1892 an Assistant Collector of the First Grade sanctioned the partition of a share of this *shamilat* between the proprietors and occupancy tenants in accordance with the revenue paid by them. The proprietors agreed to the basis on which the partition was to be made but the occupancy tenants objected that land should have been partitioned not on the basis of land revenue but on the number of ploughs. These objections were overruled by an order passed by the Assistant Collector of the Second Grade on the 27th April 1893 and an order passed by the Assistant Collector of the First Grade on the 7th September 1893. No objection was raised by the proprietors to the right of the occupancy tenants to share the land. In this partition also a portion of the land was *banjar* while the rest of the land was under cultivation. These two instances furnish very clear and convincing evidence of the special custom which the occupancy tenants have sought to prove, for they show that the alleged custom was acted upon on at least two occasions. Mr. H. L.

Sibal who appears for the proprietors frankly admits that these instances strongly support the assertion of the occupancy tenants that they are entitled to a share in *shamilat* Patti Jaimal.

The next piece of evidence on which the tenants rely are certain judgments relating to other villages of the Moga Tehsil which are situate near village Ramuwala and which are governed by similar rules. Exhibit P. 6 is a certified copy of a judgment delivered by Mr. Justice H. A. B. Rattigan on the 5th March 1910, in a case of partition relating to village Thiraj which is at a distance of two miles from village Ramuwala. In this case also the occupancy tenants claimed a share in village *shamilat* and in support of their claim they relied upon—

(1) entries in clauses 4 and 5 of the *wajib-ul-arz* of 1853;

(2) certain partitions of *shamilat deh* that occurred after the Settlement of 1852 on which occasions the occupancy tenants received their share of the *shamilat;* and

(3) the entry made at the Settlement of 1887-88 to the effect that the deceased tenant whose property was sought to be partitioned was an occupancy tenant holding under the *shamilat deh* consisting of proprietors and occupancy tenants but not the *malikan qabza.*

The occupancy tenants contended that as they were equally entitled with the proprietors to the *shamilat deh* and as the deceased tenant was recorded in 1887 as holding under the *shamilat deh* they had a right to a share in the vacant holding in proportion to the revenue paid by them. It was

Jagir Singh and others
v.
Narain Singh, etc.

Bhandari, C. J.

not denied that the deceased tenant was entered in the records as holding under the *shamilat deh*. The learned Judge observed that this entry was intended to include all persons who had a right to claim a share in the *shamilat deh* and under the terms of clause 5 of the *wajib-ul-arz* it was clear that the tenants had a right to that *shamilat* together with the proprietors when it was partitioned. The learned Judge then proceeded to cite instances of sufficient antiquity which made it quite clear that when the *shamilat* was partitioned in 1859 and again in 1866 the tenants got their shares with the owners. He accordingly decreed the plaintiffs' claim. The conclusions reached by Rattigan, J., in the year 1910, a year after he had revised his father's celebrated Treatise on Customary Law are entitled to great weight and consideration.

The facts of the case now under appeal, the evidence which was led by the parties and the entries in the *wajib-ul-arz* on which reliance was placed are similar to those on which Rattigan, J., pronounced. It is true that there is no entry in the *wajib-ul-arz* of village Ramuwala that the occupancy tenants hold under the *shamilat deh* consisting of proprietors and occupancy tenants, but nor was there one in the *wajib-ul-arz* of Thiraj. The deceased tenant of Thiraj was entered in the Settlement records of 1887-88 as holding under the *shamilat deh*. A similar entry appears in the revenue papers of Ramuwala. Mst. Chando the deceased tenant of Ramuwala was recorded as an occupancy tenant holding under the *shamilat deh*.

Another instance in which the custom in question was judicially recognised is furnished by a certified copy of the order passed by Dewan Uttam Chand, Subordinate Judge, Moga, on the 17th December 1930. In this case the occupancy tenants

of village Bohar of the Moga Tehsil claimed that they as well as the owners were entitled to succeed to the *shamilat* land left by another occupancy tenant. The learned Subordinate Judge held that occupancy tenants are entitled to a share in the *shamilat* in exactly the same way as the proprietors and decreed their suit for partition. In arriving at this conclusion the learned Judge observed as follows:—

> "I have heard the arguments of the parties' counsel, have gone through the evidence given by the witnesses of the parties, and perused copy of the mutation, the agreement, an extract from *shart wajib-ul-arz* prepared at the Settlement of 1852-53, a copy of the judgment passed by Sodhi Man Singh, and the copies forthcoming on the record of the case Indar Singh and others *v.* Nihal Singh and others. On perusal of copy of the judgment recorded by Sodhi Man Singh in case Indar Singh and others v. Nihal Singh and others, and the copies placed on the record of the said case, it is found that like the proprietors the occupancy tenants get share in the *shamilat*, that occupancy tenants are debarred from effecting sale or mortgage and that the occupancy tenants have been declared as enjoying all other rights like the proprietor. Paragraph 4 of the extract of *shart wajib-ul-arz* lends support to this. The same might be perused. It contains the following words:— *'Teht malkan jo mauroosi likhe gaiye hain unko baistisna bai wa rehn aur sab ikhtiar misal malkan hassal hain.* (The occupancy tenants, who have been shown as being

Jagir Singh and others
v.
Narain Singh, etc.

Bhandari, C. J.

under the proprietors, enjoy all other rights like the proprietors with the exception of the right of effecting sale and mortgage).' * * *

To my mind, according to the extract from the *shart wajib-ul-arz* and the judgment given in the previous case, Indar Singh and others v. Nihal Singh and others, the occupancy tenants are entitled to the *shamilat* like the proprietors and all the proprietors are bound by the agreement and the said judgment."

These two decisions furnish valuable evidence of the fact that the custom on which the plaintiffs rely was recognised by the lawful tribunals of the Province. When a judicial decision in a contested case is based upon specific instances in which the alleged custom was acted upon and is in consonance with the entries in the *Riwaj-i-am* or *wajib-ul-arz* it furnishes excellent evidence in regard to the existence of the custom.

It will be seen from the above that the special custom on which the plaintiffs rely has been established not only by the entries in the *wajib-ul-arz* of 1853 or by specific instances in which the custom was acted upon on two separate occasions but also by the existence of a similar custom in at least two neighbouring villages.

The evidence which has been produced in rebuttal is of the flimsiest and most circumstantial character. It is stated in the first place that Ram Singh, plaintiff, who appeared as P.W. 2 admitted that certain occupancy tenants such as Ruldu, Nihala, Bogha, Dittu and Jowahar died issueless but their land did not go to the other occupancy

tenants but was purchased by the proprietors. The mere fact that the occupancy tenants did not claim partition of some portions of land on the death of some occupancy tenants does not lead necessarily to the conclusion that they are not entitled to claim partition. Secondly, our attention has been invited to a statement of Kartar Singh, D.W. 1, who is one of the proprietors and who deposed that the lands left by Ruldu and others have been partitioned among the proprietors but that no share was given to the occupancy tenants. This assertion has not been supported by the production of any documentary evidence. Thirdly, it is said that when Jowahar died in the year 1880 the *muafi* was resumed by the Crown and the land mutated in the name of *shamilat* Patti Jaimal. Jowahar's instance does not militate against the case put forward by the occupancy tenants, for the land was mutated in the name of the *shamilat* which belongs both to the occupancy tenants and the proprietors and not in the names of the proprietors alone. Mr. Sibal frankly admits that this instance does not support the case of his clients. Fourthly, it is said that certain mutations make it quite clear that certain lands came to be partitioned among the proprietors of Patti in 1886. As the partition was not sanctioned these documents do not advance the case of the proprietors. The partition can at best be regarded as a private transaction. It is in evidence that the *shamilat* came to be partitioned in 1884 and again in 1893 and, as stated above, the right of the occupancy tenants to a share in the *shamilat* was recognised and admitted by the proprietors on both these occasions. Neither the trial Court nor the learned District Judge appears to have been impressed by the evidence produced by the proprietors and they both came to the conclusion that the occupancy tenants have established

Jagir Singh and others, *v.* Narain Singh, etc

the special custom which they had set out to prove. With this conclusion I find myself in complete agreement.

Bhandari, C. J.

Nor is there any substance in the contention put forward on behalf of the proprietors that the present suit is barred by time so far as the land left by Mst. Dholan is concerned. This occupancy tenant died in the year 1918 and the mutation of her land was sanctioned on the 4th June 1919,—*vide* Exhibit D. 29. It is true that the land left by her remained in the possession of the proprietors but as both the proprietors and occupancy tenants are co-sharers in the land the possession of one co-sharer must be deemed to be for and on behalf of all the co-sharers. In the absence of any evidence of ouster or the assertion of a hostile title by the proprietors the occupancy tenants are at liberty to apply for a partition of their share.

For these reasons I would accept the appeal, set aside the order of the learned Single Judge and restore that of the trial Court. The plaintiffs will be entitled to the costs of this Court.

Bishan Narain, J.

BISHAN NARAIN, J.—I agree.