(1941) 09 AHC CK 0020

Allahabad High Court

Case No: Second Appeal No. 597 of 1939, connected with S.A No''s. 598, 599 and 618 of 1939

Mst. Chameli	APPELLANT
Vs	
State Kishan Garh	RESPONDENT

Date of Decision: Sept. 22, 1941

Hon'ble Judges: Collister, J

Bench: Single Bench

Advocate: Mr. S.C. Das, for the Appellant; Mr G.S. Pathak for Respondent., for the Respondent

Final Decision: Allowed

Judgement

Collister, J.
These four appeal can be disposed of by a single judgment.

2. The Plaintiff Respondent is the Kishangarh State and the suits out of which these appeals have arisen were for recovery of chaukidari dues from certain shop keepers at the rate of 8 annas per shop per annum for a period of four years The claim was based upon a custom as recorded in the wajih-ul-arz of 128+ Fasli, equivalent to 1876-1877 of the Christian Era.

3. The suits were resisted on various grounds, one being that no custom exists as alleged in the plaint; and at the trill it was contended on behalf of the Defendants that the Plaintiff had failed to prove any general or special sanction as required by Section 66 of Act XIX of 1873.

4. The trial Court found on all points but one in favour of the Plaintiff, but dismissed the suits on the ground that the custom did not apply to these particular Defendants. There was an appeal and the learned Judge of the lower appellate Court has reversed the decree of the trial Court and has decreed the suits.

5. It is a matter of admission that a custom such as is alleged in the plaint is recorded in the wajib-ul-arz of 1876-1877 and that that settlement record has now been weeded out. It was, therefore, impossible for the Plaintiff to prove from any document on the record whether such sanction as was required by Section 66 of Act XIX of 1873 had been accorded and it was equally impossible for the Defendants to prove the contrary. In the circumstances the Courts below, having regard to the entry in the wajib-ul-arz have drawn a presumption u/s 114 of the Evidence Act that the alleged sanction must have been accorded.

6. Learned counsel for the Defendants Appellant his advanced two pleas before me in second appeal. His first plea is that the entry in the wajib-ul-arz is no ground for a presumption that sanction was granted by the Government. The second plea is that, even if such presumption is warrantable in respect to the settlement of 1876-1877 the suits must fail for the reason that no wajib-ul-arz was prepared for the current settlement.

7. The second paragraph of Section 66 of Act XIX of 1873 reads as follows:

A list of all other cesses levied in accordance with village custom shall, if generally or specially sanctioned by the Local Government, be recorded by the Settlement Officer and no cesses not so recorded shall be enforced in any Civil or Revenue Court.

8. The co responding section in Act III of 1901 is Section 86, which is to the same effect.

9. In support of his first plea learned Counsel for the Defendants Appellant relies upon Khan Bahadur Mohammad Asghar Ali Khan Vs. Rammon, and Sukurwa Vs. Sheikh Nazir Ahmed, . In the first mentioned case a learned Judge of this Court remarked that,

...the mere entry in the wajib-ul-arz or the dastur dehi by the Settlement Officer would not be sufficient to legalise the cess unless in addition the cess was generally or specially sanctioned by the Local Government.

10. The proposition is not disputed on behalf of the Plaintiff Respondent.

11. In the second of the two above-mentioned cases it was held by a Bench of this Court that the general sanction given by Government to the carrying on of settlement operations in a certain area cannot take the place of the general or special sanction to the recording of a cess by the Settlement Officer which is required by Section 86 of Act III of 1901. At page 120 the learned Judges say:

Munshi Harbishan Dayal was appointed Assistant Settlement Officer and there was also a Settlement Officer for the tehsil of Pilibhit. There was also a notification declaring this particular tehsil to be under settlement. The general or special sanction of the Local Government is, however, wanting in this. The learned Counsel for the Respondent argued that the general sanction of settlement operations

included a general sanction all these cesses We are not prepared to of hold that the sanction of a settlement operation would include such a definite sanction as is required by Section 86. In our opinion these cesses, if recorded by Munshi Harbishan Dayal as Assistant Settlement Officer with the powers of a Settlement Officer u/s 231, were neither generally nor specially sanctioned by the Local Government. The case is, therefore, not recoverable u/s 86....

12. Thus the Court took into consideration the fact that in the settlement notification there was no mention of any general or special sanction and presumably the Plaintiff had not been able to prove the sanction from any ether paper on the records of the settlement which was then current. In that case, therefore, any presumption which might otherwise have arisen u/s 114 of the Evidence Act from the entry in the dastur-dehi was definitely rebutted by the circumstances that no recorded sanction existed in the records of the settlement proceedings.

13. It is contended that in the present case, since the papers of the settlement proceedings have admittedly been weeded out, the Court being entitled to presume that official acts have been regularly performed, will be justified in holding that sanction had been accorded as required by law.

14. In one of the authorities relied upon by learned Counsel for the Defendants-Appellant, namely Khan Bahadur Mohammad Asghar Ali Khan Vs. Rammon, already referred to, the learned Judge at page 381 refers to a circular of the Board of Revenue dated 27th April, 1876, in which it was said

As to cesses under Clause (2) the Governor is not disposed to give any general or special sanction at present.

15. The wajib-ul-arz in the present case was prepared two years later in 1878 and it is argued that by that time special sanction may well have been obtained for this particular cess. The circular referred to is not before me but assuming that the passage above referred to has been correctly recited in the judgment, I think that, as an indication of the policy of Government in 1876, it would at least weaken the presumption which the Court might fee) inclined to draw u/s 114 of the Evidence Act. It is, however, unnecessary to record a finding as to whether the Courts below were or were not justified in relying upon such presumption inasmuch as I am of opinion, for reasons to be stated, that the appeals must be allowed on the second plea, that is to say on the ground that there is no record of this cess in the currant settlement.

16. In this connection my attention has been drawn to a decision of Iqbal Ahmad J. (as he then was) in Tirkha Ram Vs. Chhotey, which was followed by Ganga Nath J. In Mohammad Uddin v. Bhupau 4. In both the above mentioned cases the Plaintiff claimed the right to realise chaukidara on the basis of an entry in the wajib-ul-arz. In the 1927 case it was common ground that although the entry was recorded in the wajib-ul-arz of the previous settlement, it was not so recorded in the wajib-ul-arz of

the last settlement of 1894-1397. This view was, as I have said followed in the 1935 case by Ganga Nath J. who observed:

After the settlement or 1278 Fasli another settlement took place but no wajib-ul-arz of it was produced. If Hire had been any entry of any such chaukidara cess in it as was entered in the wazib-ul-arz of 1278 Fasli, the Plaintiff would certainly have produced it. As no such cess was recorded ii fie last settlement it is not recoverable under the provisions of Section 85 of the Land Revenue Act.

17. Learned counsel for the Plaintiff Respondent seeks to distinguish the aforementioned two decisions on the ground that in the present case no wajib-ul-arz was prepared at ill at the later settlement and therefore it is argued that the custom recorded at the settlement of 1876-1877 must be deemed to nave continued. As a matter of fact it does not appear whether in the 1935 case a wajib-ul-arz had or had not been prepared in the later settlement, but even if this were a fact, I am of opinion that this circumstance would in no way affect the result. It is clear from Section 86 of Act III of 1901 that at the time of each settlement only those cesses will be recorded and will be enforceable as have received the sanction of Government and I am of opinion that, if the custom is not recorded, no such sanction can be assumed. If no wajib-ul-arz is drawn up at any particular settlement, it cannot be inferred from this fact that the Government has sanctioned the continuance of the custom recorded in the wajib-ul-arz of the previous settlement. It is unnecessary to consider what the position might be in respect to a cess recorded at the earlier settlement if, though no wajib-ul-arz was prepared at the later settlement, there was a notification relating to that settlement which contained such sanction for that is not the case here. The words
...and no cesses not so recorded shall be enforced in any Civil or Revenue Court

18. Leave, I think, no room for doubt that if a particular cess is not recorded in the proceedings of the last settlement it is unenforceable at law.

19. This being my view, these appeals must be and hereby are allowed. The decrees of the Courts below are set aside and the suits are dismissed. There remains the question of costs. There was no specific plea in the written statements as regards Section 66 of Act XIX of 1873 or Section 86 of Act III of 1901 but it is clear from the judgment of the trial Court that this plea was advanced at the trial. On the other hand it does not appear to have been taken before the lower appellate Court. In the circumstances I direct that the parties shall bear their own costs in both Courts.

20. Leave to appeal under the Letters Patent is refused.