
(1870) 02 CAL CK 0027

Calcutta High Court

Case No: Appeal No. 1 of 1870

Tulsi Ram Sahu

APPELLANT

Vs

Harrak Sing and
Another

RESPONDENT

Date of Decision: Feb. 23, 1870

Judgement

Norman, Officiating C.J.

1. The question before us is whether the Deputy Collector was wrong in not fixing an issue upon the question whether the tenure held by the defendants is protected from enhancement by the provisions of section 3, Act X of 1859. That is the way in which the question is stated by Mr. Justice Mitter; and in my opinion it is perfectly and correctly stated. The right which, in a case like this, a ryot puts forward, is created by the 3rd section of the Act. That section gives to ryots who hold lands at rates of rent which have not been changed from the time of the Permanent Settlement the right to receive pattas; or, in other words, to continue to hold at those rates. The issue then in a case like this is "whether the ryot has held at rates which have not been changed since the Permanent Settlement." The affirmative of that issue rests on the party who asserts that he possesses that right. In my opinion the Court is not bound in any case to raise or try an issue upon the existence of a right, unless the party asserts the existence of such right, and claims to have his title tried.

2. Many cases have been cited by Mr. Gregory in the course of the argument. In considering the effect of these cases, it is necessary to observe that, in proceedings under Act X of 1859, the issue is raised on the statements of the parties on oath. It is impossible for anybody to speak from his own personal knowledge and observation as to the state of things which existed at the time of the Permanent Settlement. If, therefore, the party setting up a right to hold at fixed rates from the time of the Permanent Settlement alleges facts which show that he means to assert that, according to the best of his knowledge and belief, his rate of rent has not been changed from the Permanent Settlement, or from a time which he may reasonably believe was as remote as the

Permanent Settlement, such an allegation is sufficient. The statement is made with as much certainty and positiveness as, looking at the subject with reference to which it is made, and the restrictions under which the claimant is placed, the circumstances admit of. Thus, if a man who produced receipts extending over forty or forty-five years alleged that he and his ancestors had held at an unchanged rate for a very long time, and there was no inference that the assertion was not meant to imply that they held from a time as early as the Permanent Settlement, the Courts have treated that as an assertion that he and his ancestors had held at rates which had not been changed since the Permanent Settlement. That assertion was probably made as positively as it was in the power of the ryot to make it. I believe that not one of the cases cited is not capable of that explanation. But the present case is totally different. It is important to see what the claim here is. It is a claim to enhance the rent of the defendants' tenure, upon the ground that the plaintiff has provided means of irrigation of the land by which the productive powers of the land have increased. How is that claim met? It is met by a denial that the productive powers have increased. The defendant makes a further answer in a written statement put in before his examination; he says that, "by a fixed hereditary holding (the words used are *gujasta maurasi*) from ancient times, more than twenty years, without change or increase or decrease of rent, this land has been held." That is the written statement. He does not say as far as he or his father remembered, but "from ancient times more than twenty years;" and he does that, in order to throw the burden of proof on the plaintiff. That statement was put in on the 4th of November.

3. On the following day, he was examined u/s 59, and the issue was fixed as provided by section 65; the defendant on that occasion did not pretend to say that his predecessors had held at fixed rates from the time of the Permanent Settlement. Nothing of the kind appears to have been alluded to either by himself or his pleader. There is not one word on that point till his cross-examination by the plaintiff's pleader. In answer to that he says:--"From the time of my father, the cultivation is *khilmi* (reclaimed) ancestral. From the year 1262 (1855) the lands have been in my possession, and I hold receipts for the payment of rent. Since my *jote* has been *khilmi jote*, the lands have been held at one single rate." When were his lands reclaimed? What was the time of his father since which the cultivation was *khilmi*? That was a fact entirely within his own knowledge, and yet no statement was then made which could lead to the inference that the land had been reclaimed, and that his father held the land as reclaimed from the time of the Permanent Settlement. The case then goes to trial, without objection on the part of the defendant, on the single issue whether the productive powers of the land had been increased.

4. The defendant endeavoured to show that his lands were less productive than formerly. "What is the evidence as to that? *Shabrat*, his own witness, in his examination-in-chief, says that, when the cultivation was new in the time of the defendant's father, the production was five or seven maunds per *biga*, and now it is less. There is no doubt in my mind that the fact that the reclamation of the land by the defendant's father took place in recent times was within the knowledge of the parties present when the issues were fixed,

and that no one pretended to say that the reclamation was as ancient as the Permanent Settlement.

5. I think that the rule ought to be steadily adhered to, that, if a party does not assert a title in himself, the Courts ought not to be astute in picking out a title for him. It is a well-settled rule of law that a man cannot plead evidence, and section 4 merely relates to evidence. It merely declares that, "when in any suit under this Act it shall be proved that the rent at which land is held by a ryot has not been changed for twenty years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the Permanent Settlement, unless the contrary be shown, or unless it be proved that such rent was fixed at some later period."

6. A man is not at liberty to say "I have some evidence" (evidence which is rebuttable) "that the land was held at fixed rates from the time of the Permanent Settlement."

7. Suppose a suit was brought on a bond, and the defendant, instead of saying that he had paid the amount secured by the bond, which would be a matter the truth of which would be within his own knowledge, were to say, "I produce this paper," purporting to be a receipt; "the plaintiff's name is signed on it." That would not be equivalent to saying he had paid the money; it would be no answer to the suit. The defendant would be asking the Court to draw an inference as to a fact, the existence of which he did not venture to assert. I think that the Deputy Collector came to a right conclusion, when he said that "the defendants have not pleaded a right to hold at fixed rates, on the ground of the rent having been unchanged since the Permanent Settlement, but only that their rent has been unchanged for more than twenty years;" and that he was right in not trying the truth of an allegation which the defendants did not assert.

8. Under these circumstances I think that the decision of Mr. Justice Jackson, the senior Judge, is the correct one, and that it must be affirmed with costs.

Hobhouse, J.

9. The plaintiff in the Court of first instance sued the defendants, who are the special appellants before us, for arrears of rent upon their tenure for the year 1274 (1867).

10. The defendants put in a written statement, and one of them gave his deposition on oath, in answer to the averment of the plaintiff, and the Court of first instance gave the plaintiff a decree for a certain amount of rent, and declined in the following words to entertain the particular issue, in the matter of which there is now a contention before us. The Court remarks:--"As the defendants have not pleaded a right to hold at fixed rates, on the ground of the rent having been unchanged since the date of the Permanent Settlement, but only that their rent has been unchanged for more than twenty years, no issue has been fixed on this point. It is to be observed that their witness Shabrat Ali states that the land was first brought under cultivation by defendants' father." The Court in these terms declined to go into the question as to whether the lands were held at rates which

had remained unchanged from the time of the Permanent Settlement.

11. The case then came, after having passed through the lower Appellate Court, before a Division Bench of this Court, in special appeal, and the senior Judge in that Division Bench having differed from the junior Judge upon the question as to whether any issue arose such as the first Court refused to entertain, his judgment became the judgment of the Court, and is now u/s 15 of the Charter in appeal before us.

12. Mr. Justice Mitter has considered that the question of unchanged rate, from the time of the Permanent Settlement, was raised upon the pleadings, and that the first Court was bound, therefore, to try and determine that question; and the learned Judge would, therefore, have remanded the case for trial of that issue. Mr. Justice Jackson, on the other hand, considered that the issue did not properly arise, and the material part of his judgment may, I think, be found in the following words:--"It is no doubt," the learned Judge remarks, "the duty of the Court to lay down the proper issues; and if it appeared that in this case the issue of holding at unvaried rents from the time of the Permanent Settlement properly arose, it would be our duty to remand the case that such issue might be framed and tried; but it seems to me quite impossible, from the tenor of the defendants' title, and from their oral examination, to collect any such allegations as that theirs was a holding which had commenced previously to the Permanent Settlement, and had continued from that time to the present day at un-exchanged rates." In these words, the learned Judge seems, to me to have considered that the issue did not properly arise, because it could not be collected from the tenor of the defendants' title, and from their oral examination; and he goes on further to say that it could not be collected from certain evidence given on the part of the defendants to which he refers. The words on which Mr. Gregory for the appellant relies as raising the issue in question, are thus stated in the written statement of the defendants. The defendants there state that the tenure is not liable to enhancement by reason of its being "a gujasta maurasi tenure from ancient times, for more than twenty years, without change, or increase or decrease of the rate at which this tenure has been held; that the cultivation (jote) was ancestral, and has remained, according to old custom, at one rate; and by reason of the tenure being gujasta maurasi the rent is not enhanceable, and the prayer to enhance is opposed to the provisions of section 4, Act X of 1859." This, in my opinion, is, on the very face of it, a statement somewhat vague in terms; but still in making that statement, the defendants do point to the provisions of section 4, Act X of 1859, the terms of which section will be seen to comprehend a tenure which was in existence at the time of the Permanent Settlement; and if this statement had stood alone, and was all that we had to consider in this case, I should have been inclined to say that, having reference to the various precedents, *Bhojrubnauth Sandyal v. Mutty Mundle* W.R., 1864, Act X Rul., 100, *Jugmohun Dass v. Poornoo Chunder Roy* 3 W.R., Act X Rul., 133, *Nyamutoollah v. Gobind Chunder Dutt* 4 W.R., Act X Rul., 25, *Dhun Singh Roy v. Chunder Kant Mookerjee* 4 W.R., Act X Rul., 43, *Gooroo Dass Mundle v. Sheikh Durbaree* 5 W.R., Act X Rul., 86, *Poolin Beharee Sein v. Nemaye Chand* 7 W.R., 472, and *Koonwur Raj Coomar Roy v. Assa Beebee* 3 W.R., Act

X Rul., 170, on which Mr. Gregory has relied, there was some indication that the defendants had at one time intended to plead that they held a tenure of the nature contemplated by section 4. But whatever the defendants may have intended to plead when they first filed their written statement, I think it is quite clear, from the subsequent proceedings, that they abandoned, if ever they seriously attempted to put forth, any such case as that the tenure existed and was held at one rate of rent from the time of the Permanent Settlement, I observe that the written statement was put in on the 4th November. On the 5th November, the defendant was examined, and I understand that in his examination-in-chief he confined himself merely to the statement that the lands had not been improved by the irrigation works put up by the plaintiff, and that no measurement of the lands had been made in his presence; and it was not until he was subjected to cross-examination that he made anything like even an allusion to the existence of his tenure at the time of the Permanent Settlement, and then what he said on that occasion was something very far short of what he had only the day before stated in his written paper. The words he used were these:--"From the time of my father, this cultivation is khilmi, ancestral. In 1263 (1856) the lands under cultivation were under my possession, and I hold receipts for payment of the rents; and since my lands had been khilmi jote, from that time one patta or rate has prevailed." This seems to me to be a considerable departure, and resiling from the statement he made the day before on paper. Then it seems to me, as pointed out by the pleader for the respondent, that, in accordance with the provisions of section 65 of Act X of 1859, it is at any rate principally from the examination of parties that the issues which have to be decided under Act X are to be framed. I do not think that it can be said, as the pleader would have contended, that the written statement should not be taken into consideration at all, because, by the provisions of section 59 such a statement is receivable in evidence; and it would be absurd to suppose that the Legislature, while it provided that such written statements might be placed on the record, could have intended that such statements should not, when on the record, be taken into consideration. However, I think, with reference to the provisions of section 65, that it was intended that the Revenue Courts in framing issues should more particularly look to the examination of the parties themselves. The issues in this case framed after the examination of the parties, i.e., of the defendants, on the 5th November 1867, was this:--Have the productive powers of the lands been increased by the ahur, which the plaintiff set up; and if so, to what extent. This was the issue which, after the examination of the parties, and in their presence, the Revenue Court laid down and to this issue the evidence on both sides was directed: and beyond the vague statement to which I have referred, as having been given by the defendant in his examination, there is nothing that has been shown to me which points to the trial of any issue other than that which has been already referred to. Neither is there anything on the record, in the way of protest, on the part of the defendants against this issue, nor in the way of a request from them that any other issue, in addition to that stated, should be entertained and determined by the Court. The case upon the record was closed on the 27th November, and on the 28th November the Court gave judgment upon it. Then on that day, for the first time, there seems to have been something like a suggestion that the

Court ought to have tried an issue as regards the existence of the tenure of the Permanent Settlement. This appears in the shape of a petition on the part of the defendant by his mooktear, and not verified; the material part of which is couched in these terms:--"Though my gujasta cultivation is from the time of the Permanent Settlement, and documentary evidence has been put in of twenty-nine years, yet by reason of its being entered in the written statement "more than twenty years," and not the words "Permanent Settlement," consideration or issue in respect of the gujasta has not been fixed. The fact is that, when the number of years is not specified, then when I said "more than twenty years," that is equivalent to having said 100 years, and the Permanent Settlement is in 1202 (1795)." Therefore, the petitioner concludes, by praying that the Judge do conduct, or cause to be conducted, a local investigation, and we may presume that it was a local investigation, amongst other matters, of the question of the existence of this tenure at the time of the Permanent Settlement. Upon this petition, the Judge remarked that the case was closed; that he was about to give his decision, and therefore he rejected the prayer in the petition; and thereafter in his judgment, the Judge gives that decision in the matter of this particular issue which I have before quoted. It seems to me, upon this state of the evidence as it appears upon the record, that, if we may say that there was in the first instance something in the written statement of the defendant upon which the issue before us might have been founded, I think we cannot but say, upon examining his own deposition and those of his witnesses, and upon looking to the conduct of the case on his part in the first Court, that he never did really intend to raise, and did not attempt to raise until he had been defeated upon the real point, an issue upon the question of the existence of the tenure at the time of the Permanent Settlement; and I am confirmed in this opinion by observing that, when the defendants appealed to the lower Appellate Court, they did not say that an issue had not been framed and tried which ought to have been framed and tried, and did not demand a retrial on such new issue; but they said that, upon the evidence on the record, this particular fact, in the matter of which they now come before us, had been established. It results from what I have said that I agree with the learned Judge whose decision has prevailed in this case, that the issue did not properly arise, though I do not agree altogether with every reason on which the learned Judge has supported his decision; and though Mr. Gregory for the special appellant contends that it is not in this way that we are entitled to deal with the judgment now before us, yet I apprehend that the point before us, on which the learned Judges differed, is, whether, upon the evidence on the record, the Judge of the first Court was right or wrong, whatever his reasons were, when he decided that this issue did not arise, and could not be decided by him; and I think that, upon this point, the learned senior Judge is right when he says that the issue did not arise. I would, therefore, affirm his judgment, and dismiss this appeal with costs.

Bayley, J.

13. I regret very much to say that I differ from my learned colleagues in the view that I take of this case. I think that the judgment of Mr. Justice Mitter is right, and ought to be

affirmed. At this late hour I will not enter into all the details and particulars that we have heard in the course of the argument, but will confine myself to two leading facts in the case which I consider material.

14. The plaintiff sued to enhance the rent of the defendants by reason of the greater productiveness of the soil, in consequence of certain irrigation works alleged to have been provided by the plaintiff.

15. The defendants denied that the productiveness in the soil had increased, and made the following written statement in answer to the plaintiff's claim in words which, for exact reference, I read from the Court's paper-book:--"The rate has continued from long before twenty years, without alteration or change, at old hereditary rate." Defendants then go on to state in the same written statement: "The former proprietors did not, by reason of the old hereditary tenure, enhance the rent. Under such circumstances, plaintiff's suit for enhancement of rent on the basis of the notice is inadmissible, u/s 4, Act X of 1859, and various precedents."

16. After this written statement was put in, one of the defendants was examined. There the examination-in-chief refers only to the question of the productiveness of the soil. The Court asks the defendant no question as to whether defendant pleaded that his tenure was protected by reason of its existence from the time of the Permanent Settlement or not, but the plaintiff's vakeels asks him some questions to which the defendant answers in the terms given by Mr. Justice Hobhouse. He does not there specifically mention either section 4, or that he held from the time of the Permanent Settlement, or from more than twenty years. He merely says that the lands are khilmi (reclaimed) lands of a hereditary nature, maurasi, and from his father's time. Upon these statements of the defendants, the Deputy Collector was of opinion that the plea of exemption from enhancement, under the provisions of sections 3 and 4, Act X of 1859, was not intended to be taken by the defendants, and therefore no issue was necessary to be fixed upon this point. I may as well here refer to a petition, dated the 27th November 1867, put in by the defendants, in which they very clearly stated that, by the use of words like "all along, more than twenty years," they meant to have the benefit of the presumption of section 4, and that the use of the words more than twenty years" was equivalent to naming 100 years, and the Permanent Settlement was within 73 years, in 1202 (1795). It is true that this petition seems to have been put in, after the evidence had been taken, and when the Deputy Collector was about to pronounce his judgment; but yet I take it as an index to the nature and character of a plea of exemption under sections 3 and 4, which the defendants really all along intended to set up against the plaintiff's claim. Under the provisions of Act X, it is not absolutely necessary for a party to plead precisely in the very words of the sections, and it was for some time a question of doubt, whether to entitle a ryot to the benefit of section 4, it was necessary for him, expressly to refer the Permanent Settlement; but the whole current of decisions of our Court has now settled the point that it is not necessary for a ryot expressly to use the very words, if he pleads substantially that he has held at one rate from the period of the Permanent Settlement; and if he proves twenty years"

holding at any uniform rate, that will suffice to raise the presumption that he held at one rate from the time of the Permanent Settlement; and it will be then for the other party to rebut the presumption by showing that the rent had varied at some period subsequent to the Permanent Settlement. Now section 59 of the Act seems to contemplate that the real facts are to be elicited by the Court from the examination of the parties, and also from the plaint and written statements. In the present case, however, it is clear that there was no examination of the defendant by the Court on the point as to whether the nature of his tenure was such as to bar the plaintiff's suit for enhancement, with reference to sections 3 and 4 of Act X of 1859. Now, from the words in the written statement of the defendants above cited by me, and also from their petition of the 27th November referred to above, it seems to me sufficiently clear that the defendants gave the Court to understand that their tenure had existence from a very long date, and invited an issue on the question, whether it was liable to enhancement, under the provisions of sections 3 and 4. It is, however, contended that, when the Deputy Collector declined to raise an issue upon this question, this point was not made a subject of appeal before the lower Appellate Court. But I think that such a point was taken, though not very clearly, in the words where the defendants said that the lower Court was wrong in not allowing them the exemption they sought under the provisions of section 4. Again, in the third ground of special appeal to this Court, we distinctly find that there was an objection by the defendants that the very issue should have been distinctly raised and tried. It is clear from the judgment of the Deputy Collector that he did not raise and try the issue, simply because the defendants said that they held at one rate for more than twenty years, instead of saying that they held from the time of the Permanent Settlement, which statement alone, it seems in his opinion, would have entitled the defendants to the benefit of section 4. The Deputy Collector says:--"As the defendants have not pleaded a right to hold, at fixed rents, on the ground of the rent having been unchanged since the date of the Permanent Settlement, but only that their rent has been unchanged for more than twenty years, no issue has been fixed on this point." As pointed out above, this view is clearly opposed to the whole current of decisions of this Court, which have invariably held that the naming of the Permanent Settlement is not absolutely necessary.

17. For these reasons I think the defendants in their written statement, and in the petition of 27th November, and in the whole tenor of their answer, gave sufficient means to the Court to raise the issue as to whether their tenure was protected under the provisions of sections 3 and 4, Act X of 1859.

18. I concur, therefore, with Mr. Justice Mitter in holding that the Deputy Collector was wrong in not having raised and tried an issue upon that point. I would, accordingly, reverse the judgment of the senior Judge, Mr. Justice Jackson, and remand the case to the first Court for determination of the issue above noticed.