# Sechan vs Ram Chandra Bahadur on 22 February, 1952

## Equivalent citations: AIR1952ALL934, AIR 1952 ALLAHABAD 934

JUDGMENT

Mushtaq Ahmad, J.

1. This is a defendant's appeal in a suit for resumption of plots 498 and 501 in mauza Nawapura, district Banaras under Section 195, U. P. Tenancy Act on the allegations that those plots had been a service grant (Moafi Khidmati) to the defendant's ancestor and that the service being no longer required by the plaintiff-zamindar the same were liable to be resumed.

2. The defence taken was that the defendant had become the proprietor of the plots and that, in view of Sections 191 and 192 of the said Act, the plaintiff was not entitled to resume them.

3. This litigation has had rather a chequered history, and it would be convenient to refer briefly to the various stages through which it has run. On 20-2-1942, the suit was originally dismissed on the merits. On 15-6-1942 an appeal against this decree to the Collector was also dismissed. On 2-3-1943, the Commissioner in second appeal set aside both these decrees on the view that an issue of proprietary title should have been referred by the revenue Court to the civil Court under Section 286 U. P. Tenancy Act. The civil Court having received such an issue found that the defendant was not the proprietor.

Then the Sub-Divisional Officer, on receipt of this finding, accepted the same and should in the ordinary course have decreed the suit. He, however, dismissed it on the finding that the grant in this case was of a date prior to the permanent settlement and that, therefore, under Section 191 (1) (a) of the said Act the plaintiff could not eject the defendant. This decree was set aside in appeal on 9-2-1945, and the appellate Court remanded the case to the Sub-Divisional Officer with the direction that the matter should be approached from a different stand-point. Then, on 30-11-1946, the Sub-Divisional Officer decreed the suit for ejectment on the finding : (1) that the area recorded as Moafi in the register of Moafiat in 1197 Fasli in the name of Dasrath Hajjam, defendant's ancestor, being only 8 biswas and the area now in dispute being 0.61 acre, the latter did not tally with the former and was, therefore, quite different from the same and (2) that the grant was a service grant, as entered in the Khatauni of 1291 Fasli, within the meaning of Section 192 (2) (c).

4. On these findings the trial Court held that the defendant-appellant had not become the proprietor of the plots and was liable to be ejected under Section 195 of the Act.

5. An appeal against this decree was dismissed by the lower appellate Court on the same findings, that is, the learned Judge also found (1) that the defendant being a grantee for service could not have acquired a proprietary interest, and (2) that the grant was not proved to have existed prior to 1197

Fasli which was the year of the permanent settlement.

6. On these findings, the lower appellate Court also held that the defendant was liable to be ejected under the same Section 195 of the Act.

7. Mr. Krishna Shanker, appearing for the defendant appellant, addressed me not only a very elaborate but able argument in support of the appeal. His contention in a nutshell was that the plaintiff had failed to prove the ingredients of Section 195 of the Act which alone could justify a claim for ejeetment. This section reads:

> "Except in a case in which the grantee becomes a proprietor or an under-proprietor under the provisions of Section 192, a grantee may be ejected from his grant in all oases in which rent may be fixed thereon or the rent thereof enhanced if by the terms of the grant or by local custom, it is held--
>
> (a).....
>
> (b) for the purpose of some specific service, religious or secular, which the landlord no longer requires; or
>
> (c) ....."

The provisions contained in this section entitled the landlord to seek the ejectment of the grantee, unless a certain position has been made out which would be a bar to such a claim. Obviously, where no such position is pleaded or proved, the ejectment of the grantee would follow as a matter of course. The provision preventing ejectment seems to furnish an exception to the general rule allowing ejectment. This exception, on the face of it, has to be pleaded and proved by the party relying upon it affirmatively and not disproved by the landlord in a negative fashion. If I am right in this view, then I have answered the question of burden of proof raised by the learned counsel for the appellant. Of course, I have yet to see what the findings in this case are and whether the same are decisive of the appeal.

8. Shorn of other details, this Section 193 would in substance mean that, unless a grantee has become a proprietor or under-proprietor under Section 192, he would be liable to ejectment in all cases in which rent could be fixed on the grant and among other things the grant was for the purpose of some specific service no longer required. In other words, ejectment would not follow where the grantee had become a proprietor under Section 192 or where the grant was not for some specific purpose no longer required. A fortiori, if it is found that the grantee has not become a proprietor under this section, he would be liable to be ejected where the grant was for the purpose of some specific service no more required. We shall have to see what are the findings in this case on these two points. Section 192 which has been referred to in Section 195 of the Act provides:

> "(1) Subject to the provisions of Section 191 a landlord or a grantee or a tenant of a grantee may sue for a declaration that land held rent-free . . .

(a) in Agra is held in proprietary right, and for the fixation of revenue thereon, or

2. No suit shall lie under the provisions of Sub-section (1) unless such land--

(a).....

(b) .....

(c) not being held for the performance of some service, religious or secular, or conditionally, or for a term, has been held in Agra rent-free for fifty years immediately before the seventh day of September 1926 ....."

9. This section deals with a suit for declaration for the relief mentioned in the section. Shortly, the section authorises a suit for declaration of a proprietary right in respect of land held rent-free where the land, without being held in lieu of service, has been held in Agra for fifty years prior to 7-9-1926. The question of fact involved in this section is whether the particular grant in suit was or was not held for the performance of a service. On this also we have to see whether there is a finding of the Courts below and whether the same is binding in second appeal. Section 191 which has been referred to in Section 192 (1) of the Act enacts:

"All land held rent-free. . . shall be liable to fixation of rent or revenue . . . unless--

(a) it is held rent-free in a district or portion of a district which is permanently settled under a grant made prior to the permanent

(b) .....

(c) ....."

This means that a grant in a permanently settled district not held since prior to the permanent settlement is liable to have rent settled thereon. This, section in its turn raises the question of fact whether the grant was of a period prior to the permanent settlement. Again, there is a finding on this point by the Courts below, and we have to see whether it can be disturbed.

10. A comparative study of the above Sections 191, 192 and 195, U. P. Tenancy Act would evolve the position that a grant is resumable unless it

1. is of a period prior to the permanent settlement, and

2. is, at the same time, one of a non-service nature. If it is of that period and also not in lieu of service, the grantee becomes a proprietor, acquiring immunity from ejectment under Section 195 of the Act. If it is of a subsequent period, that alone is enough to make the grantee liable to ejectment, just as, if it is in lieu of service, that alone is enough to make him so liable. The vital questions, therefore, are:

1. whether the grant in this case was of a period prior to the permanent settlement, and

2. whether it was a service grant. Let us now see the findings of the Courts below on these questions.

11. On the question relating to the inception of the grant, the Courts below concurrently found that it was not of a date prior to 1197 Fasli which they took as the year of the permanent settlement in this district. The learned civil Judge in his order of remand of 9th February 1945, referred to above, mentioned that the permanent settlement had come into effect in 1197 Fasli, that is in 1790 A. D. The trial Court in its last judgment of 30th November 1946 also framed the issue No. 2 as "whether the grant is prior to 1197 Fasli", thereby assuming that the year 1197 was the year of the permanent settlement. No objection to this assumption was taken by the defendant in his grounds of appeal in the lower appellate Court, and the learned District Judge also observed in his judgment in appeal that "a permanent settlement came into force from 1197 Fasli". No objection was taken to this as a wrong statement of fact in the grounds of appeal in this Court. No objection to it again was taken before me by the learned counsel for the appellant yesterday when the appeal was argued for about an hour and a half, remaining part-heard at the fag end.

Today for the first time it was contended that the permanent settlement had in fact taken place in 1795 according to Regulation XXVII [27] of 1795, which authorised the extension of Bengal Regulation I [1] of 1793 to the district of Banaras. Naturally I found myself at some pains to decide as to whether I should bind the appellant by his former attitude in assuming with the respondent that the year 1197 Fasli was the year of the settlement, an assumption clearly borne out by what I have just stated, or I should allow the point to be raised for the first time before me that the assumption was wrong and that in point of fact this permanent settlement had taken place later than 1197 Fasli=1790 A. D. and that, inasmuch as in the register Moafiat of 1197 Fasli there was an entry of the grant, it must be taken to have been of a period prior to the permanent settlement. My difficulty was enhanced when, in keeping with the statements in the judgment of the learned District Judge and also in the order of the learned Civil Judge of 9th February 1945, referred to above, there is a remark in Mr. Bilgrami's Tenancy Law at p. 1143, 1950 edition that "the permanent settlement tame into force from 1197 Fasli (1789-90)".

This is precisely what is found in the judgment of the lower appellate Court also. The position is not necessarily mutually contradictory, for, if the Regulation XXVII [27] of 1795 was made retrospective so as to have taken effect five years earlier, of course the permanent settlement could be said to have "come into force from 1197 Fasli (1789-90)". As to when a particular statute came into force would ordinarily be a question of fact, and, where both the parties are found to have agreed to a certain position at all the stages of the trial, it would be difficult for this Court in second appeal to allow a departure from the position uniformly taken and permit the argument that everybody had been wrong so far and that the state of conditions was in fact quite different.

Of course, if the settlement in this case had taken place in 1795, as it was sought to be contended today before me, and if the grant in the present case is the same as entered in the register Moafiat of 1197 Fasli, surely it was of a period prior to the settlement. And in that case, unless it was a service grant, the grantee could certainly become a proprietor. The question of the nature of the grant involving the question of the purpose for which it was made essentially makes the question of the inception of the grant merely academic. I have already pointed out that the mere fact that the grant may have been made prior to the permanent settlement would not be enough to vest the grantee with a proprietary interest, it being further necessary that it was not a service grant. That clearly follows from Section 192 (2) (c), U. P. Tenancy Act.

12. But before entering into the question of the nature of the grant, there is a yet other difficulty in the way of the defendant-appellant. The trial Court found, as already stated, that the grant now in dispute did not tally with the grant entered in the register Moafiat of 1197 Fasli. While the area now in dispute is 0.61 acre, that entered in the said register in the name of Dasrath Hajjam, ancestor of defendant, is only 8 biswas out of one bigha and two biswas, the difference between the two areas being assessed to rent. It was thus not possible to treat that register, confined as it was only to 8 biswas, as the origin of the grant now set up. In this view, it is wholly immaterial to enquire whether the permanent settlement took place in 1790, the year of the register Moafiat or later in 1795, the year when Regulation XXVII [27] of 1795 was promulgated. So far as the grant now in dispute is concerned there is thus simply no evidence of its inception, if we eliminate, for the reasons just mentioned, the register of 1197 Fasli altogether.

13. On the question of the nature of the grant as I have already said, both the Courts below said that it was a service grant. Learned counsel for the appellant relying upon a Bench decision of this Court in Sukhram Puri v. Mohammad Ashfaq, 1930 ALL. L. J. 641 argued that as held in that case, the grant could not be resumed only on the ground that the service for which it had been made was no longer required. The decision in that case depended essentially on its own facts. One of the terms of the grant, as entered in the wajib-ul-arz there, was that the grant would not be resumable so long as the worship was performed by the grantee. The allegation on which resumption had been claimed by the landlord was that he no longer required worship to be performed. This, strictly speaking, did not come within the purview of the terms as entered in the waijb-ul-arz.

The condition precedent to the ejectability of the defendant in that case was that the grantee should have stopped the service, which was not the case there, and not that the landlord required him to stop it, which is the case here. As assumed by the parties in this case, the grant was resumable, if proved to be a service grant, when the landlord did not require the service. This case is, therefore, quite different from the ruling relied upon.

14. Approaching the case from all material points of view, I find no ground to disturb the judgment of the lower appellate Court, and, therefore, dismiss this appeal with costs.

15. Leave to appeal to a Bench is asked for and is granted.