

(1951) 02 CAL CK 0028

Calcutta High Court**Case No:** Full Bench Reference No. 2 of 1950 in Appeal from Appellate Decree No. 377 of 1945

Siva Prosad Kundu Chaudhuri

APPELLANT

Vs

Jitendra Nath Ghoshal

RESPONDENT

Date of Decision: Feb. 8, 1951**Acts Referred:**

- Bengal Tenancy Act, 1885 - Section 105, 105A, 106, 107, 108
- Civil Procedure Code, 1908 (CPC) - Section 11

Citation: (1952) 1 ILR (Cal) 364**Hon'ble Judges:** Harries, C.J; Das, J; Banerjee, J**Bench:** Full Bench**Advocate:** Lala Hemanta Kumar, for the Appellant; Apurbadhan Mukherjee and Dwijendra Nath Mukherjee, for the Respondent

Judgement

Das, J.

This appeal is at the instance of Defendant No. 1. It arises out of a suit instituted by the Plaintiff in the First Court of the Munsif, Howrah, for a declaration of his nishkar (rent-free) right in the disputed land, for correction of the entry in the record-of-rights to the effect that the land is liable to assessment of rent and for a further declaration that the ex-parte order in a proceeding u/s 105 of the Bengal Tenancy Act is not binding on the Plaintiff and for a permanent injunction restraining the Defendant No. 1 from proceeding with a suit instituted by the latter for recovery of rent in respect of the disputed land.

2. The Defendant No. 1 filed a written statement alleging that the disputed land was not nishkar and that the order u/s 105 of the Bengal Tenancy Act was binding on the Plaintiff and precluded the latter from setting up a nishkar right.

3. The munsif dismissed the suit on the finding that the land was not nishkar and that the order u/s 105 was cogent evidence in proof of that fact.

4. The Plaintiff preferred an appeal to the court of the District Judge. The appeal was heard by the Subordinate Judge, First Court, Howrah, who allowed the appeal and decreed the Plaintiff's suit on the finding that the land was nishkar and that the ex-parte order u/s 105 was not conclusive to negative the nishkar right of the Plaintiff.

5. The Defendant No. 1 preferred this Second Appeal to this Court.

6. The appeal was heard by Sen and Chunder JJ., who were of the opinion that there was a divergence of judicial opinion on the point of the binding character of ex parte orders in Section 105 proceedings.

7. As the question arose in a Second Appeal, an order was made referring the whole appeal to a Full Bench.

8. The question that arises, may be formulated as follows:

Whether an ex-parte order in a proceeding u/s 105 of the Bengal Tenancy Act settling a fair and equitable rent in respect of a holding concludes the tenant from proving his nishkar right in a subsequent suit for declaration of such right.

9. Obviously no question of res judicata arises, because the revenue officer, who decided the Section 105 proceeding, is not competent to try the latter suit for declaration of the nishkar right.

10. It was contended that finality of a decision in a Section 105 proceeding is provided for in Section 107.

11. Section 107 lays down that the decision of the Revenue Officer in any proceeding u/s 105, Section 105A and Section 106 shall have the force and effect of a decree of a civil court in a suit between the parties and subject to the provisions of Sections 108 and 1150, shall be final.

12. We have, therefore, to enquire as to what is decided in an ex parte proceeding u/s 105.

13. Section 105 enables either the landlord or the tenant to apply to the revenue officer for settlement of fair and equitable rent in respect of the land held by the tenant.

14. In a proceeding u/s 105, the scope of inquiry is limited to a decision of the question of quantum of fair and equitable rent payable for the holding.

15. It was urged that such a decision implies that the land is liable to payment of rent and is not nishkar.

16. That such a constructive adjudication is not to be regarded as a decision within Section 107 follows from the provisions contained in Section 105A.

17. Section 105A was added by the Amending Acts of 1907 and 1908 for the then Provinces of East Bengal and West Bengal.

18. The object of the amendment was to get rid of the difficulty experienced by revenue officers in settling fair rent where the tenant raised, by way of defence, the issues which are now set out in Section 105A.

19. A proceeding u/s 105 proceeds on the assumption that the entries in the finally published record-of-rights are correct. Before the introduction of Section 105A, if the tenant sought to raise the issues stated in Section 105A, he had to take recourse to a suit u/s 106. The proceedings for settlement of fair and (sic) rent had to wait till the suit u/s 106 was finally (sic) up to the appellate court. This was a long and complicated procedure.

20. The amendments in 1907 and 1908 got over this difficulty, by (sic) Section 105A.

21. Section 105A empowered the revenue officer to try and (sic) the issues mentioned in Clause (a) to (g) if such issues arise (sic) the course of proceedings u/s 105.

22. Such issues arise when a party to the proceedings asserts the (sic) involved in the issue and the assertion is denied by the other party.

23. It is only then that the revenue officer proceeds to try and (sic) the issue raised and his decision becomes final under (sic) 107.

24. If no issue as is set forth in Clause (a) to (g) of Section 105A is raised, the revenue officer is not called upon to try and decide the issue, (sic) he merely settles the fair and equitable rent. In such a (sic) there is no decision by the revenue officer on any of these (sic) and no question of finality u/s 107 arises.

25. Clause (a) of Section 105A relates to the question whether the and is or is not liable to the payment of rent.

26. If the tenant appears and raises the question of nishkar, the (sic) officer is required to try and decide the question and his decision on this question becomes final.

27. But where the tenant does not appear in Section 105 proceedings (sic) no question is raised as to the nishkar character of the land, (sic) revenue officer is not concerned to decide the question. He (sic) settles the fair and equitable rent. His decision is confined (sic) to the question of the amount of fair and equitable rent (sic) the holding which was the only matter before him. The (sic) provided for in Section 107 is limited in such cases, to the termination of the quantum of fair and equitable rent.

28. Section 109 of the Bengal Tenancy Act is also of no help (sic) the Appellant. It rather supports the view taken above.

29. The relevant portion of Section 109 reads as follows:

Subject to the provisions of Section 1150, a civil court shall not entertain any application or suit concerning any matter which is or has already been the (sic) of an application made, suit instituted or proceedings taken under (sic) 105 to 108 (both inclusive):

Provided that nothing contained in the section shall debar a civil Court from entertaining a suit concerning any matter which--

(a) * * *

(b) has not been finally adjudicated upon in any such proceeding or suit.

30. The bar imposed by the section has reference to the matter which was the subject of the application u/s 105 and was finally adjudicated upon.

31. As already pointed out, the subject-matter of the application u/s 105 is only the settlement of fair and equitable (sic) where no issue u/s 105A arises. It is only the matter (sic) fixing the fair and equitable rent which is finally adjudicated upon in such cases.

32. The conclusion, therefore, follows that an ex parte order u/s 105 of the Bengal Tenancy Act settling a fair and equitable rent in respect of the land held by the tenant is final only on this matter and is not final as regards the issue; mentioned in Clause (a) to (g) of Section 105A unless such issues arise (sic) the course of the 105 proceedings.

33. The decisions of this Court which have taken a contrary view must be deemed to have been wrongly decided and are overruled.

34. The question referred to the Full Bench is answered accordingly.

35. In the present case, the ex parte order u/s 105 does not show that the issue as to the nishkar character of the holding arose before the revenue officer or that he decided the same. The ex parte order is not, accordingly, binding on the Plaintiff as regards the nishkar right claimed.

36. As the question arose in a Second Appeal, the whole appeal was referred to the Full Bench.

37. The finding of the lower appellate court is that the Plaintiff acquired the nishkar right on the basis of a lost grant. This finding is based on two facts, viz., an admission made by (sic) authorised agent of the landlord in a cess return filed in 1925 and the long possession of the Plaintiff and his predecessors-in-interest for 40/50 years without any demand or payment of rent to the landlord.

38. It is not disputed on behalf of the Appellant that these facts are sufficient to support the finding of the Subordinate Judge (sic) regards the nishkar right of the

Plaintiff.

39. It was first contended that the findings of fact are not supported by the evidence on record.

40. The learned Subordinate Judge has referred to the evidence in support of his findings. As such, his conclusions based on evidence relevant and admissible in law, cannot be assailed in Second Appeal.

41. It was next contended that it was not open to the Subordinate Judge to inquire into a case of acquisition of nishkar right on the basis of a Last grant, as there was no such case raised in the plaint.

42. A perusal of the plaint, however, makes it abundantly clear that necessary averments in proof of such a title were made in the plaint. The plaint recited long possession without payment of rent in assertion of a nishkar right and referred to the admission of nishkar right by the landlord in the cess return. The plea was also debated in both the courts below.

43. There is thus no substance in this contention.

44. It was finally contended that the decree is not correct in so far as it declares the inoperativeness of the Section 105 proceedings. The meaning of this declaration is clear. What the Subordinate Judge meant is that, the ex parte order in the Section 105 proceedings does not affect the nishkar right of the Plaintiff.

45. The result is that this appeal fails and is dismissed. The Plaintiff is entitled to his costs of the hearing before us and before the Division Bench.

Harries, C.J.

46. I agree.

Banerjee, J.

47. I agree.

48. In the answers he has given. I desire to add a few words.

49. Section 109 of the Bengal Tenancy Act provides that:

A civil court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under Sections 105 to 108 (both inclusive):

Provided that nothing contained in this section shall debar a civil court from (sic) a suit concerning any matter which--

(a) was the subject-matter of an application u/s 105, or Section 105A, or of a suit u/s 106, if such application or suit has been dismissed for default or withdrawn, or

(b) has not been finally adjudicated upon in any such proceeding or suit.

50. In other words, the decision of the revenue officer is final.

51. Of course, this is subject to the provisions of Section 115C which provides for appeals from decisions of revenue officers. It is well settled that, when an appeal is preferred, the order or decree against which the appeal is preferred loses its finality. The decree or order of the appellate tribunal supersedes the decree or order of the court below. Subject to this, Section 109 makes the matter adjudicated upon by the revenue officer final. The words in the section "which is" read with the words of prov. (b) make it clear that until there is adjudication upon a matter by revenue officer, the civil court is not deprived of its jurisdiction to entertain a suit concerning the matter.

52. In this case, the revenue officer settled a fair and equitable rent for the land in question. That finding implies that the land in question is liable to the payment of a rent. But the question before us is whether this liability is finally determined and cannot be questioned in any civil court.

53. The solution of this problem is afforded by Section 105A.

54. Ordinarily, decision of a revenue court on a question of (sic) is no bar to the trial of the same question by the ordinary civil court. The legislature, however, can empower the revenue court to determine questions of title so as to constitute (sic) protanto a civil court. Revenue courts are chiefly courts (sic) jurisdiction limited to adjudicate upon questions of rent, (sic) etc. There are, however, some matters of which the decision (sic) a revenue court is expressly declared by the Act constituting (sic) revenue court to have the force of a decree in a civil suit and some as to which it is declared that the decision shall be final. In such cases, the decision of a revenue court will operate a res judicata so as to bar the trial of the same matter in a civil court.

55. u/s 105 of the Bengal Tenancy Act, an application (sic) be made for settlement of a fair and equitable rent by a (sic) officer, in cases where settlement of land revenue is not being (sic) is not about to be made. His only duty, therefore, is to (sic) the rent and nothing else. But Section 105A says where, in (sic) proceedings for the settlement of rents under this Part (Ch. X) any of the issues specified in that section arises, "the revenue officer shall try and decide such issue and settle the rent u/s 105 accordingly."

56. One of the issues specified is:

(a) Whether the land is, or is not, liable to the payment of rent;

57. The section is mandatory. The words are "the revenue officer "shall try and decide...." The revenue officer must try and decide the issue. In other words, the legislature expressly empowers and directs the revenue court to decide the issue

and he must do it. But he can do so only when the issue arises and not otherwise. Now, when does an issue arise (sic) Issues arise when a material proposition of fact or law affirmed (sic) one party is denied by the other. It follows, therefore, that (sic) a matter is heard ex parte and there is no denial of a fact a proposition of law, no issue arises. If, therefore, to a (sic) application for settlement of a fair and equitable rent (sic) is no appearance, the tenant does not deny the facts stated the application and there is no issue to try. But some of the (sic) of our Court have applied the principle of constructive (sic) *judicata* in such cases. They proceed on the principle that (sic) matter is constructively in issue. A matter is said to be (sic) in issue when it might and ought to have been de a ground of attack or defence. Matters are actually in (sic) when they are actually alleged by one party and denied by (sic) other. But it often happens that a matter which might and (sic) to have been made a ground of attack by the Plaintiff to (sic) him to the relief he claims in the suit is not actually (sic) by him as a ground of attack. Likewise it happens that matter which might and ought to have been made a ground of (sic) by the Defendant is not actually set up by him as a (sic) of defence. In such cases the Expl. IV to Section 11, (sic) Procedure Code, says:

Any matter which might and ought to have been made a ground of defence attack in the former suit (but which has not been actually alleged as a ground attack or defence) shall be deemed to have been a matter directly and substan-(sic) in issue in such suit.

58. Other words, though it is not actually in issue, it is (sic) as being in issue. The word "deem" suggests that it is (sic) but it is regarded as being in issue and is deemed to have (sic) decided. Can we apply this principle to an issue which (sic) not actually arise in any of the proceedings under Sections 105 to (sic) of the Bengal Tenancy Act? Section 105A nowhere (sic) powers the revenue court to decide any of the matters specified (sic) that section until and unless it arises. There is no suggestion (sic) in the section that a revenue officer can decide a matter (sic) does not actually arise but may be "deemed" to have (sic).

59. A tribunal is competent only to decide matters which the (sic) commits to its decision and no other. Its jurisdiction (sic) be found within the four corners of the enactment which (sic) the jurisdiction. Having regard to what I have said and (sic) the nature of a revenue court, I am unable to hold that a (sic) officer is entitled to try and decide any matter specified (sic) Section 105A which does not actually arise before him. In other (sic) my view is that the doctrine of constructive *res judicata* (sic) not apply to a decision of a revenue officer on any matter (sic) in Section 105A.

60. During the argument, an illustration was taken which is follows. Suppose, a matter does not actually arise, that is say, it is not actually stated or traversed, but the revenue off of his own accord raises an issue and actually tries and (sic) it. Will that be *res judicata* in a suit? I am clear in my (sic) mind that the answer must be in the negative. But it is necessary to express any final opinion on this point because

(sic) this case the question as to whether the land in question is (sic) or not to pay rent was not raised and/or tried and/or (sic). That is admitted by Appellant's counsel.

61. I am, therefore, of opinion that the civil court can (sic) the suit for a declaration that the land in question is not (sic) to pay any rent.

62. I concur in the answers given.