(1923) 02 CAL CK 0037

Calcutta High Court

Case No: None

Sasi Kanta Acharjya	APPELLANT
Vs	
Salim Sheikh	RESPONDENT

Date of Decision: Feb. 27, 1923

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 105, 109

Citation: AIR 1923 Cal 624 : 74 Ind. Cas. 1001

Hon'ble Judges: Walmsley, J; B.B. Ghose, J

Bench: Division Bench

Judgement

B.B. Ghose, J.

These appeals arise out of as many suits for rent at an enhanced rate on several grounds stated in the plaints. The Munsif made a partial decree in favour of the landlord, the plaintiff. On appeal by the defendants, the Subordinate Judge has dismissed the claim for enhancement on the ground that the suit for enhancement is not maintainable under the provisions of Section 109 of the Bengal Tenancy Act, the landlord having made applications u/s 105 of the Act before the Revenue Officer, on the authority of the case of Abeda Khatun v. Majubali Chowdhury 59 Ind. Cas. 760 : 48 C. 157 : 24 C.W.N. 1020 : 33 C.L.J. 304. The learned Vakil for the appellant argues before us that there is a difference of opinion with regard to the construction of Section 109, and contends that the case of Abed a Khatun v. Majubali chowdhury 59 Ind. Cas. 760 : 48 C. 157 : 24 C.W.N. 1020 : 33 C.L.J. 304 is distinguishable from the present case and that the other cases relied on by him support his contention that such a suit is maintainable, notwithstanding the provisions of; Section 109 of the Bengal Tenancy Act V Before deciding the question, it stem? to me that it is necessary to look into the provisions of Section 109 of the Act in order to see whether the present suit for enhancement is maintainable. What happened in this case was, that the plaintiff presented an application u/s 105 of the Bengal Tenancy Act before the Revenue Officer with regard to a number of (sic), on the 18th of

September 1917, he presented a petition before the Revenue Officer to the effect that certain of the tenants whose holdings had been recorded in a number of khaliat is had compromised the suit but certain other tenants among whom are the present defendants did not appear for the purpose of coming to a compromise, and he prayed that permission might be granted to him to bring suits in the Civil Court against the defendants who had not compromised and that the case might be disposed of according to the compromise entered into by the others. On this petition, the Revenue Officer made this order; "Plaintiff files a petition for permission to withdraw cases against the defendants of khatiand Nos. 172, 196 etc., The prayer is allowed. Other defendants have compromised. Put up on 27th September 1917 for judgment." In the judgment, nothing further is said with regard to those defendants who did not compromise. Now, section of the Bengal Tenancy Act runs thus: " Subject to the provisions of Section 109A, 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)". There cannot be any doubt that this matter, which is now for decision in the Civil Court, was a matter which was the subject of an application made u/s 105 of the Bengal Tenancy Act. The contention is that, when the application u/s 105 was withdrawn against these defendants, the operation of Section 109 cannot come into play or, in other words, the contention is that, unless there has been a decision on the application by the Revenue Authority it is open to the party who made the application to bring a suit in the Civil Court with regard to the same subject-matter. It seems tome that to accept such a contention would be to make an addition to the section and to read the words " subject of an application made" as if they stand for "subject of a decision", which, in my judgment, we cannot do. Therefore, apart front authorities, it would seem that the decision of the learned Subordinate Judge is right as regards the true construction of Section 109 of the Bengal Tenancy Act. It is contended, however, by the learned Vakil for the appellant that a number, of cases have been decided the other way and that this matter should be referred for decision to a Full Bench. The cases to which he refers are these Chiodilh v. Tulsi Singh 18 Ind. Cas. 130 : 40 C. 428 : 17 C.W.N. 467; Aswini Kumar Aich v. Sarada Char an Pasu 37 Ind. Cas. 253 : 24 C.L.J. 79; Kamini Sundari v. Abdul Halim 47 Ind. Cas. 420 : 28 C.L.J. 254 and Saraj Kumar Acharji v. Umed Ali 63 Ind. Cas. 954 : 25 C.W.N. 1022 : 35 C.L.J. 191:AIR (1922) (C.) 251. In the case of Chiodith v. Tulsi Singh 18 Ind. Cas. 130 : 40 C. 428 : 17 C.W.N. 467 the learnea Judges, although they expressed an opinion in favour of the contention now advanced by the learned Vakil for the appellant, sain this: " Moreover, it cannot well be said that the subject-matter of the application made in 1906 and the subject-matter of the suit brought in 1909 are the same. " If the subject-matter of the two proceedings were different, then the suit was certainly maintainable and Section 109 of the Bengal Tenancy Act would not prevent a party from bringing a suit. That case is, therefore", distinguishable from the present case and the observations made therein do not prevent us from taking a, different view. The same may be said of the

case of Aswini Kumar Aich v. Sarada Charan Basu 37 Ind. Cas. 253 : 24 C.L.J. 79. The learned Judges in that case said this, These matters are entirely foreign to that Jurisdiction of the Revenue Officer u/s 106, this work being confined to a decision of the point whether the entry M the Record of Rights is correct, or not." Similarly, in the case of Kamini Sundar v. Abdul Halim 47 Ind. Cas. 420 : 28 C.L.J. 254 of the learned Judges observed as follows "We are unable to agree with him that is, the Subordinate Judge)'' in this opinion as it seems to us that the subject-matter of the u/s 106 and the surjeet-matter of the present suit are entirely different." The case of Saraj Kumar Acharji v. Umed Ali 63 Ind. Cas. 954 : 25 C.W.N. 1022 : 35 C.L.J. 191: AIR (1922) (C.) 251 apparently follows the previous cases, and the case of Abeda Khatun v. Majulali Chowdhury 59 Ind. Cas. 760 : 48 C. 157 : 24 C.W.N. 1020 : 33 C.L.J. 304 is distinguished on the ground that, in that case, there was no permission to withdraw the suit with leave to bring a fresh suit. It may be said that in the present case also there was ro srch leave granted. It may be a question as was raisen in the case of Saraj Kutnai Acharji v. Umed Ali 63 Ind. Cas. 954 : 25 C.W.N. 1022 : 35 C.L.J. 191: AIR (1922)(C.) 251, that, even if such leave were granted, whether the Revenue "Officer had any jurisdiction to grant leave to bring a suit in a Court of different'' jurisdiction. There is no provision, however, in the Bengal Tenancy Act that an application made u/s 105 and subsequently withdrawn has this effect, such application had never been mace. It is only the legislature that can wipe out the effect of an application made by reason of its being withdrawn and we cannot supply what may possibly be an omission of the Legislature in not making such a provision. With great respect, therefore, I am unable to accept the opinion'' expressed for some of the cases that as application made and withdrawn Ryas the effect as if the application had never been made. There does not appear to be any binding decision to the contrary on the question involved in these cases. On the other hand, the facts in Abeda Khatun v. Majubuli Chowdhury 59 Ind. Cas. 760 : 48 C. 157 : 24 C.W.N. 1020 : 33 C.L.J. 304 closely resembles the facts in the cases before us. The appeals must, therefore, be dismissed and with costs in those cases in which the respondents have entered appearance.

Walmsley, J.

I agree.