

(1925) 07 CAL CK 0059**Calcutta High Court****Case No:** None

Taramonee Choudhurani and
Others

APPELLANT**Vs**

Sheikh Elim and Others

RESPONDENT**Date of Decision:** July 28, 1925**Acts Referred:**

- Bengal Tenancy Act, 1885 - Section 105

Citation: AIR 1926 Cal 582 : 92 Ind. Cas. 714**Hon'ble Judges:** Chakravarti, J**Bench:** Single Bench

Judgement

Chakravarti, J.

The suit out of which this second appeal by the plaintiffs arises was for recovery of rent. The plaintiffs, claimed rent at the rate of Rs. 13-4 per annum as was settled in proceedings u/s 105 of the Bengal Tenancy Act. The defence of the defendants was that the rent payable was at the rate of Rs. 4-13 a year. They denied that there was any proceeding u/s 105 of the Bengal Tenancy Act and also stated that if any order u/s 105 was obtained in secret it was not binding upon them.

2. The only issue raised in the case was "Can the plaintiffs recover rent at the rate of Rs. 13-4". No issue was raised as to the validity or otherwise of the proceedings u/s 105 at all.

3. The Court of first instance found that there was no fraud as regards the proceedings u/s 105 and held that the defendant was bound by the order u/s 105 which showed that the rent settled was Rs. 13-4 per annum. The first Court further found that the defendants produced no dakhilas to show that the rent was paid at the rate of Rs. 4-13 as alleged by them. The Trial Court, therefore, gave a decree to the plaintiff for the rent claimed at the rate of Rs. 13-4 per annum. On appeal by the defendant No. 1 the learned Subordinate Judge reversed the decree of the Munsif

and gave a decree for rent at the rate of Rs. 4-13.

4. The learned Vakil who appears for the plaintiffs-appellants has contended before me that the judgment of the learned Subordinate Judge was erroneous because the Court had made a new case for the defendants upon which no issue was raised. Next he contended that a mere finding on the denial of the defendants that no notice was served does not affect the validity of the order u/s 105 and lastly it was contended that the lower Appellate Court was in error in enquiring as to whether the order u/s 105 was passed upon sufficient evidence.

5. It is to be regreted that the respondents did not appear before me.

6. It appears to me that the judgment of the learned Subordinate Judge cannot be maintained. As I have already stated no issue was raised by the defendants on the question of validity or otherwise of the order u/s 105. The Court of first instance found that there was no fraud in the proceedings. The lower Appellate Court on the denial of the defendants, that there was any proceedings u/s 105 held that that was enough to show that the proceedings u/s 105 were not binding upon the defendants. In the absence of any fraud which was not even alleged in the written statement or taken in the grounds of appeal before the lower Appellate Court and not found by that Court it was not open to the learned Subordinate Judge to try the question as to whether there was any service of notice or not in the proceedings u/s 105. The learned Subordinate Judge does not deal with any evidence as to non-service of notice in the proceedings u/s 105. All that he found is upon the denial of the defendants that there was any service. If the defendants wished to challenge the proceedings u/s 105 on the ground of non-service of notice it was not open to them to do so in the present proceedings. They ought to have, if they chose, questioned the proceedings before the Settlement Officer or by way of proceedings appropriate for such relief or by appeal. A decree relied upon by a party can be challenged on the ground of fraud or want of jurisdiction. No question of want of jurisdiction arises here, and as there was no issue as to the proceedings u/s 105 being vitiated by fraud and there was no finding that there had been any fraud sufficient in law to take away the force of the order made u/s 105, I think, therefore, the learned Subordinate Judge, upon the findings arrived at, was not justified in not giving legal effect to the order u/s 105 and that effect was that as between the plaintiffs and the defendants Rs. 13-4 was settled as the rent payable by the defendants to the plaintiffs.

7. I think the learned Subordinate Judge was not justified in interfering with the judgment of the Court of first instance. I, therefore, set aside the decree made by the learned Subordinate Judge and restore that of the first Court with costs in all Courts.