

(1935) 05 CAL CK 0022
In the Calcutta High Court

Gunarberinissa Choudhurani and Others	APPELLANT
Vs	
Gopendra Prosad Sukul and Another	RESPONDENT

Date of Decision : 13-05-1935

Acts Referred:

Bengal Tenancy Act, 1885 — Section 174(3)(b)
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1936 Cal 275 : 163 Ind. Cas. 72

Hon'ble Judges : Khundkar, J;Henderson, J

Bench : Full Bench

Judgement

Henderson, J.—The first point which arises for decision in this rule is whether the deposit which is required by proviso (b), Sub-section (3), Section 174, Ben. Ten. Act, is to be made at the time the application is filed, or before the application is allowed. The petitioners filed an application and the learned Subordinate Judge directed them to deposit the amount recoverable under the decree within ten days. The petitioners then obtained this rule. They are supported by the decision in Mofijuddin Muhuri v. Mofizuddin 1934 Cal 491. On the other hand the opposite parties rely on certain general arguments and certain observations made by Mukerji, J., in Kuloda Prosad v. Kumar Prativa Nath Roy 1935 Cal 91. On behalf of the opposite parties it is contended that inasmuch as the applicants cannot get any relief without making the deposit, it would be futile to provide that the deposit will not be required until some subsequent date; further if the intention of the legislature was to discourage false and frivolous applications, it is obvious that that object can only be obtained if the deposit is made at the time when the application is filed So far as attaining this object is concerned Lort-Williams, J., referred to this difficulty. Mukerji, J., also in the other case said this:

The learned Judges have pointed out the enormous difficulties that are experienced in construing the clause. We are very doubtful if it was not the intention of the legislature that the word "allowed" in the clause should be read in the sense of "entertained", because we are unable to hold that unless it is so read the difficulties can be solved; the solution suggested in the aforesaid

decision, in our opinion is not a satisfactory solution of the difficulties.

2. On the other hand the learned Advocate who supported this rule asked us to examine the matter from the point of view of an applicant who is unsuccessful. His contention is that when the application may be dismissed on the merits it would be unreasonable to call upon the applicant to deposit a sum of money which might have to be returned. Finally the matter may be examined from the point of view of the destination of the money. No doubt if the section merely provided that a deposit is only to be made when the applicant is the judgment-debtor, it might be argued that it is quite reasonable to ensure that whatever might be the result of the application, the admitted debt may be liquidated and a stop put to further proceedings in execution. The difficulty here is that the deposit is to be made whether the judgment-debtor is the applicant or not. We entirely agree with the opinion of Lort-Williams, J., that it is impossible to decide what should be the proper destination of the deposit without taking into consideration the facts of each particular case. We have therefore come to the conclusion that it is quite impossible to decide this important point by attempting to decide what was the intention of the legislature, and to what extent that intention has been carried out by the actual provisions of the section; in our opinion the only satisfactory way to decide the question is to consider the words which have been actually used. If that is done there can, in our judgment, be no doubt that to admit an application is not the same thing as to allow it, and we accept the reasoning adopted by the learned Judges in the case reported in *Mofijuddin Muhuri v. Mofizuddin* 1934 Cal 491. It cannot be said that this decision has been directly affected by the observations of Mukerji, J., in *Kuloda Prosad v. Kumar Prativa Nath Roy* 1935 Cal 91, because he was not expressly deciding the point, and did not go further than to enunciate a certain doubt. On the other hand the view taken by Lort-Williams, J., has also been taken in Civil Revision No. 1215 of 1933 by Mallick and Jack, JJ.

3. It is further contended on behalf of the opposite parties that this is a matter with which we cannot interfere under the provisions of Section 115, Civil P. C., as the only point involved is one of a wrong decision on a point of law. It is clear that the learned Subordinate Judge has gone further than that. What he has really done is that under an erroneous construction of the section he has refused to entertain and decide an application which the statute directs him to decide. Such a matter is clearly within the purview of Section 115 of the Code. Lastly it was contended that we ought not to interfere because the petitioners have another remedy by way of appeal. Certainly, if the learned Subordinate Judge had dismissed the application, the petitioners could have filed an appeal, and if they did not do so, we might refuse to give them any relief in revision; but in the present case we do not even know that the learned Subordinate Judge will dismiss the application. He may keep it pending indefinitely. Furthermore when once the rule has been issued, no useful purpose would be served by discharging it and leaving the parties to get the same point decided in appeal.

4. For these reasons we make the rule absolute, and direct the Subordinate Judge to determine the petitioner's application in accordance with law. Costs of this rule will abide the result. We assess the hearing fee at two gold mohurs.

Khundkar, J.

5. I agree.