

(1896) 12 CAL CK 0013
In the Calcutta High Court

Kalihur Ghose and Others

APPELLANT

Vs

Umae Patwari and Others

RESPONDENT

Date of Decision : 11-12-1896

Acts Referred:

Bengal Tenancy Act, 1885 — Section 16

Citation : (1897) ILR (Cal) 241

Hon'ble Judges : Rampini, J; Banerjee, J

Bench : Division Bench

Judgement

Banerjee and Rampini, JJ.—In this appeal, which arises out of a suit for arrears of rent, the question raised on behalf of the plaintiffs-appellants is whether the Courts below are right in disallowing a part of the claim on the ground that the notice required by Section 16 of the Bengal Tenancy Act has not been given to the Collector. The learned Vakil for the appellants contends that, upon a proper construction of that section, the Courts below ought to have held that the suit was maintainable, and that the plaintiffs were entitled to a decree in full, notwithstanding the absence of the notice in question; and that all that the section was intended to bar was the actual recovery of any rent by execution of the decree; and in support of this contention he relies upon the decision of the majority of the Full Bench in the case of Alimuddin Khan v. Hira Lall Sen ILR 23 Cal. 87. Now Section 16 runs in these words: "A person becoming entitled to a permanent tenure by succession shall not be entitled to recover by suit, distraint or other proceeding any rent payable to him as the holder of the tenure, until the Collector has received the notice and fees referred to in the last foregoing section." Having regard to the language of the section, and to the fact that it is in one sense a provision of a penal character, and should, therefore, receive a liberal and not a stringent construction, we are of opinion that the section does not preclude a party from instituting a suit for rent, notwithstanding that the Collector has not received the notice and the fees referred to therein, although it is a bar to the plaintiffs obtaining a decree before the notice and the fees are received by the Collector. If the section had been intended to bar the institution

of a suit, it would have contained words, such as "shall not be entitled to maintain a suit." The distinction between incompetency to maintain a suit, until certain conditions are fulfilled, and incompetency to recover by a suit, is a well recognized distinction, and is one that is pointed out in the case of *Hassall v. Wright* L. R. 10 509 and is also noticed in the case of *Alimuddin Khan v. Hira Lall Sen* ILR 23 Cal. 87 cited on behalf of the appellants.

2. But though that is so, we do not think that even this liberal construction of the section can help the plaintiffs at all. They did not, upon the objection being raised, give notice to the Collector and deposit the necessary fees as required by Section 16, but they insisted upon their right to proceed with the suit to final judgment without complying with the condition imposed upon them by the section. And the contention on their behalf now is that the words "recover by suit" should be construed to mean "realize by suit," and that the only thing that the section is intended to bar is the actual realisation of the money by the plaintiff's. We are not prepared to accept that contention as correct. To give effect to it would be to hold that the plaintiff is entitled to ask for a decree, of which on his own admission he is at the time incompetent to enforce actual satisfaction. Indeed, if the appellant's contention be correct, there would be nothing to prevent his proceeding, even with the execution by the sale of the defendant's holding or under tenure, provided only that he does not ask the Court to pay over to him the money realized. We do not think that that would be a reasonable construction of the section. The plaintiffs not having taken any steps during the pendency of this suit to comply with the conditions imposed upon them by Section 16, we must hold that the Courts below have rightly disallowed the part of the claim now in question, and the appeal must consequently be dismissed with costs.