
(1929) 07 PAT CK 0039
In the Patna High Court

Kandhaya Lal

APPELLANT

Vs

Sheo Tahal Ahir and Others

RESPONDENT

Date of Decision : 24-07-1929

Acts Referred:

Bengal Tenancy Act, 1885 — Section 105, 109, 9

Citation : AIR 1930 Patna 69 : 123 Ind. Cas. 412

Hon'ble Judges : Wort, J

Bench : Single Bench

Judgement

Wort, J.—These appeals raise an interesting and somewhat difficult question. The Court of appeal below has come to the conclusion by reason of Section 109, Bengal Tenancy Act, and by reason of - the fact that in or about the year 1912 an application was made u/s 105, Bengal Tenancy Act that the plaintiff's claim in this suit is barred.

2. No question arises in these appeals as regards the claim for arrears of rent in which the plaintiff has succeeded; but a serious question does arise and that is whether the learned Additional District Judge was right in deciding that Section 109, Bengal Tenancy Act, prevented the plaintiff from succeeding in this action. It is to be noticed in the first place, as the learned Advocate on behalf of the appellant relies upon the particular circumstance, that the application in 1912 was dismissed for default. It would appear that there was some sort of application, by the applicant in that case to withdraw his application but consent to that was refused, the result being, as I have stated that the application was dismissed for default. He contends, therefore, that that fact makes all the difference and incidentally does not preclude him from now agitating the question of whether he is entitled to enhancement of rent. The argument really is under two heads: first of all he says that Section 109, Bengal Tenancy Act, does not prevent his bringing this action because the subject-matter of this action was not the subject-matter of the application u/s 109, Bengal Tenancy Act, before the Settlement Officer, there being at the time a settlement in progress. Section 109

provides:

Subject to the provisions of Section 109-A, 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.

3. In the first place it would appear that quite clearly Section 109 was a bar to the suit. But it is contended, as I have already stated, that this is not the same subject-matter as the application in 1912. The learned Advocate for the appellant argues that there has been a fresh rise in the price of staple food crops and consequently his application u/s 105 in 1912 was in substance entirely a different matter. That argument needs some consideration. But his further argument on the other branch of the case is this, that the application in the circumstances u/s 105 was not a settlement of the rent within the meaning of Section 113 for the reason that the application was dismissed for default.

4. In support of his argument the learned Advocate for the appellant relies upon a decision of this Court in this case of Gopal Lal Ray Vs. Taj Muhammad, . Kulwant Sahay, J., in delivering the judgment of the Court, referring to the fact that the Subordinate Judge was of the opinion that the suit that was barred had been a suit for enhancement of rent of the tenure points out that there is a wide difference between Section 9 and Section 37, Bengal Tenancy Act, and comes to the conclusion that the suit was not barred as the former application was dismissed for default: and he adds, in the course of his judgment, that he was of the opinion that the cause of action in the present suit was not the same as the cause of action in the previous suit and, therefore, the present suit was not maintainable. This perhaps, if I may say so, is a very cogent argument in favour of the appellant; but it is little difficult to see how that decision is binding upon me in this particular case as it is to be noticed that the section which the learned Judge was construing in the case was Section 9 and he points out, as I have already stated, a considerable difference between Sections 9 and 37, Bengal Tenancy Act. Section 9 provides:

When the rent of a tenure-holder has been enhanced by the Court or by contract it shall not be again enhanced by the Court during the 15 years next following the date on which it has been so enhanced.

5. Section 37 which deals with enhancement of rent provides:

A suit instituted for the enhancement of the rent of a holding on the ground that the rate of rent paid is below the prevailing rate, or on the ground of a rise in prices, shall not be entertained if within 15 years next preceding its institution the rent of the holding has been enhanced by a contract made after the 2nd March, 1883, or if within the said period of 15 years the rent has been commuted u/s 40, or a decree has been passed under this Act or any enactment repealed by this Act enhancing the rent on either of the grounds aforesaid or on any ground corresponding there-to or dismissing the suit on the merits.

6. The learned Judge, as I have already said, points out the difference between those sections, the difference being quite clearly that Section 9 provides that the rent shall not be enhanced if it has been enhanced within 15 years and Section 37 provides that there shall not be any enhancement if there has been an enhancement by a Court on either or any of the grounds aforesaid or the suit has been dismissed on the merits.

7. It is important to notice in this connection two decisions one in 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 in which it was decided that an application u/s 105 whether it was withdrawn or whether-it was dismissed for non-prosecution was nevertheless an application made within the meaning of Section 109, Bengal Tenancy Act, and is an effective bar to any subsequent claim within the period of 15 years for an enhancement of rent. But the learned Advocate on behalf of the appellant seeks to differentiate that case from the present by reason of the fact that the claim in that case was a claim for increased rent on the ground of the increased area held by the tenant. The other case to which reference has been made is the case of *Becharam Choudhuri and Others Vs. Purna Chandra Chatterji and Others*, . In that case the Full Bench decision arose out of a case for the recovery of arrears of rent and the enhancement of the existing rent; and, in the course of the judgment *Walmsley, J.*, pointed out that the prohibition contained in Section 109, Bengal Tenancy Act, is in the making of an application, or, to use his own words:

In my opinion, therefore, it is making of the application that brings into play the prohibition of Section 109, and the answer that I would give to the reference is to the effect, namely, that if an application is made u/s 105, Bengal Tenancy Act, and subsequently withdrawn, whether with or without the permission of the Court, a suit on the same subject-matter is barred by the provisions of Section 109, Bengal Tenancy Act.

8. It seems difficult in connexion with one argument placed before the Court by the learned Advocate on behalf of the appellant to understand his main contention, namely, that this was a new cause of action because if that argument is to be supported, it seems difficult to see how that could not also be an answer to the section which prohibits an enhancement within a period of 15 years. In my judgment it seems to me that Section 109 is undoubtedly a bar to these proceedings. The words of the section are specific, they are clear, and, so far as the circumstances of this case are concerned there is no doubt that an application was made u/s 105, and as pointed out in the judgment to which I have made reference, that that was the only necessary circumstance which would be urged in order to make the maintainability of a subsequent suit and impossibility, it is to be noted in this connexion that in the case of *Becharam Choudhuri and Others Vs. Purna Chandra Chatterji and Others*, the facts were substantially the same as those in the present case and the points of difference which the learned Advocate seeks to urge with regard to the other cases quoted

are not present in this case and it seems an extraordinary fact, although it is by no means conclusive, that this point was not taken either before the Bench which decided the case in the first instance or before the Full Bench which came to the decision to which I have made reference; and, I have said, it seems rather difficult to imagine that if the fact which is argued by the learned Advocate on behalf of the appellant did make any differences why that point was not urged. As I have said, it is merely an argument on the case which is by no means conclusive of the matter, but it does come as a matter of surprise to me that an important point like that was not taken, if it in fact made any difference to the proposition, namely, that, once an application u/s 105 is made, all subsequent proceedings are barred.

9. It is necessary to mention the other argument, namely, that a suit is not barred because the rent was not settled within the meaning of Section 113, Bengal Tenancy Act. The substance of this point is whether an application dismissed for default is tantamount to an application dealt on the merits. It would appear that the order-sheet in Section 105 case is conclusive as regards this matter as the statement of the Settlement Officer is that it is a fair and equitable rent.

10. In my judgment nothing further need be said on that matter, and the appeal must, therefore, be dismissed with costs.