

(1940) 11 CAL CK 0004
In the Calcutta High Court

Kumar Sanat Kumar Mukherjee

APPELLANT

Vs

Debendra Nath Sarcar and Others

RESPONDENT

Date of Decision : 13-11-1940

Acts Referred:

Bengal Tenancy Act, 1885 — Section 105, 105A

Citation : AIR 1941 Cal 332

Hon'ble Judges : Roxburgh, J; Bartley, J

Bench : Full Bench

Judgement

Bartley, J.—These are appeals against the decision of the special Judge in proceedings under Sections 105 and 105A, Ben. Ten. Act, in which the learned Judge set aside the decision of the Assistant Settlement Officer. The landlord who is the appellant before us instituted a number of suits u/s 105, Ben. Ten. Act, for settlement of rent in respect of certain lands. At the same time he raised a special issue u/s 105A of the Act, upon which he paid court-fees, as to the correctness of certain entries in the settlement record. After the institution of the Section 105 proceedings the landlord stated in a petition that he would be satisfied if the issue u/s 105A only were decided treating the proceedings as proceedings under S.106 leaving the question of enhancement: of rent open for the present. On that petition the Settlement Officer made an order to the effect that he did not think it necessary to try the case u/s 106 of the Act as the special issue could be decided u/s 105A. Subsequently the landlord filed another petition stating that during the hearing the defendants had raised a plea that the Court was not competent to decide the question u/s 105A without also deciding the question of enhancement and that in view of that position the plaintiff did not give up his right to have the rent enhanced and desired that the question of enhancement should be gone into if the Court held that it could not be postponed to some future date. The ultimate result however was that the Settlement Officer decided the question u/s 105A of the Act without considering the question of settlement of fair rent.

2. On appeal the learned special Judge has held that as the landlord had not pressed his substantive application u/s 105 he could not claim to have the special issue raised u/s 105A adjudicated on and in this view of the matter allowed the appeals and set aside the decision of the Assistant Settlement Officer. Now the question of law for our decision in these cases is whether when an application u/s 105, Ben. Ten. Act, is for any reason not proceeded with the Court has still jurisdiction to hear and decide a special issue raised u/s 105A of the Act. It has been strenuously contended on behalf of the respondents that a special issue u/s 105A can only arise in proceedings instituted u/s 105 and that where for any reason the settlement of fair and equitable rent is not made and the proceedings in so far as that matter is concerned are abandoned, there can be no adjudication as to the correctness or otherwise of the Record of Rights u/s 105A of the Act. In this connexion our attention has been drawn to two reported and two unreported cases and it must be said at once that the unreported cases are in conflict with the reported decisions. Only one of the cases however is a decision of a Divisional Bench and in that case, *Hrishikesh Chatterjee and Others Vs. B. Naba Krishna Roy Chowdhury and Others*, it has been laid down that when an application by the landlord u/s 105 is dismissed for default in a proceeding in which the tenant has raised the question u/s 105A the tenant's application must nevertheless be proceeded with and the issue raised thereby determined.

3. The same view was taken in the reported (case in *Satis Chandra Mukhopadhyaya and Another Vs. Naba Krishna Roy Chowdhury and Others*, which was a decision by a single Judge. We are inclined respectfully to agree with these decisions and all the more so because in one essential particular the facts of the present cases lend even greater support to the view taken in them. In both the reported cases it was held that the plea of the tenant u/s 105A raised by way of defence in a proceeding u/s 105 brought by the landlord must be adjudicated on in spite of the withdrawal of the landlord's original petition which conferred jurisdiction on the Settlement Officer to enquire into the matter. In the present cases the application u/s 105A was made not by the tenants by way of defence but by the landlord himself by way of claim, or to put the matter in another way as one of the reliefs sought in his plaint. It would seem illogical to hold that where a plaintiff brings a suit and subsequently withdraws one portion of his claim the Court should be debarred from adjudicating on the remainder of that claim. In this view of the matter we think on a full consideration of the materials and the law, placed before us by the learned advocates that we are bound to hold that the petitions previously referred to with regard to the original claim for settlement of fair rent, even if they do amount to withdrawal by the plaintiff of his applications u/s 105, did not debar the Court below from proceeding to enquire into and adjudicating on the question raised u/s 105A of the Act. In this view of the matter, these appeals must be allowed, the decision of the learned special Judge set aside and the cases remanded to him for disposal in accordance with law. The appellant will have one set of costs in these appeals. A

consolidated hearing-fee of Rs. 42 is assessed for these appeals.

Roxburgh, J.

4. I agree.