
(1922) 07 PAT CK 0013
In the Patna High Court
Case No : S.A. No. 911 of 1920

Maharaja Bahadur Kesho Prasad Singh	APPELLANT
Vs	
Bhagwat Saran Pande	RESPONDENT

Date of Decision : 10-07-1922

Acts Referred:

Citation : (1922) 07 PAT CK 0013

Final Decision : Dismissed

Judgement

Das, J.—This appeal arises out of a suit instituted by the respondent for abatement of rent u/s 52(b) of the Bengal Tenancy Act. The area of the plaintiff's holding according to the Jamabandi is 3 bighas 3 kathas and 16 dhurs and the Jamabandi shows that the rent payable by the defendant in respect of this holding is Rs. 15-15-0. The Record of Rights, however, shows that the area in possession of the plaintiff is 2 bighas 3 kathas and 4 dhurs. The defendant applied u/s 105 of the Bengal Tenancy Act for settlement of fair rent on the ground that there was a rise in the average local price of staple food crops. The Settlement Court gave effect to the contention of the landlord and settled the rent at Rs. 17-13-9. The plaintiff's suit was instituted subsequent to the settlement of rent by the Settlement Court and there is no allegation in the plaint that there has been any diminution in the area of the holding subsequent to the settlement of rent by the Settlement Court. The Courts below have given effect to the contention of the plaintiff and have allowed abatement accordingly.

2. Two questions have been urged by Mr. Kulwant Sahai on behalf of the appellant in this Court. First, that the judgment of the lower appellate Court proceeds on a misapprehension in so far as it thought that the defendant did not deny the allegation of the plaintiff that the original settlement of the land was at Rs. 5 per bigha, and, secondly, that the present suit is not maintainable in view of the provisions of section 109 of the Bengal Tenancy Act.

3. The first question arises in this way. The land was originally settled with the plaintiff by the Government and the Government subsequently sold their

proprietary interest in the land to the Dumraon Raj. The plaintiffs case is that the original settlement was at the rate of Rs. 5 per bigha. The defendant contends that a consolidated rent of Rs. 15-15-0 was fixed for the holding in the possession of the defendant. It is obvious that if the defendant's case is right then the plaintiff is not entitled to any abatement of rent and the suit must accordingly fail. The question then is this, was the original settlement at the rate of Rs. 5 per bigha, or was a consolidated rent fixed in respect of the holding in possession of the defendant? The plaintiff undoubtedly alleged in the plaint that the original settlement was at the rate of Rs. 5 per bigha. The learned Judge in the Court of Appeal says that there was no denial of this allegation in the written statement. It appears, however, that there is a clear denial of the allegation in the written statement of the defendant. Mr. Kulwant Sahai has argued before me that this was a vital point in the case, and if there was any misapprehension in the mind of the Court I ought to remand the case to that Court for a decision of the point I ought to mention that the Court of first instance came to the conclusion that the original settlement was a settlement at the rate of Rs. 5 per bigha. It was clearly the duty of the lower appellate Court to discuss the evidence bearing on this point and to come to a conclusion, not on the pleadings of the parties, but on the evidence adduced before the Court. The question then which I have to consider is, whether I ought to remand the case to the lower appellate Court for a decision of this point, or whether in order to save a remand, I ought to determine the point in this Court. Only two witnesses have been examined in the case and there is no reason at all why I should not determine this point in this Court.

4. The witness examined on behalf of the plaintiff is definite on the point that the land was settled at the rate of its. 5 per bigha and he denies that there was a consolidated rent for the defendant's holding. The defendant examined a Patwari. In the examination-in-chief he did say that the Jama was a consolidated Jama but in cross-examination he had to admit that his knowledge was based on the Jamabandi of the plaintiff. He was not present at the time when the land was settled with the plaintiff by the Government, and obviously his evidence on this point is of no importance whatever. It was urged by Mr. Kulwant Sahai that the Jamabandi of the defendant itself constituted an important evidence in his favour. I am unable to agree with this contention. The Jamabandi in no sense binds the plaintiff and I am of opinion that the Court of first instance was right in coming to the conclusion that the land was settled with the defendant at the ratn of Rs. 5 per bigha.

5. I now come to the next question, namely, whether the plaintiff's suit is barred by the provisions of section 100 of the Bengal Tenancy Act. Now, the important point to remember in this connection is this: In those proceedings the defendant claimed an enhancement of rent on the ground that there was a rise in the average local price of the staple food crops, No question was raised by the plaintiff as to whether he was entitled to an abatement of rent u/s 52(b) of the Bengal Tenancy Act. Section 109 runs as follows.-"Subject to the provisions of

section 103A"-We are not in this suit concerned with the applicability of section 109A-"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, both inclusive." The critical question then is this, has this question, namely, the question whether the plaintiff is entitled to relief u/s 52(b) of the Bengal Tenancy Act, been the subject of an application made, suit instituted or proceedings taken under sections 105 to 103, both inclusive? Admittedly it was not directly the subject of an application u/s 105 of the Bengal Tenancy Act; but it has been urged by Mr. Kulwant Sahai on behalf of the appellant that the question might or ought to have been raised by the plaintiff in the proceeding u/s 105 and that accordingly we must assume that constructively it was the subject of an application made u/s 105 of the Bengal Tenancy Act.

6. Fortunately for me, the question has been decided by two learned Judges of the Calcutta High Court in the case of Nawab Bahadur of Murshidabad Vs. Ahmad Hussain and Others, . In that case the landlord applied for settlement of rent u/s 105 of the Bengal Tenancy Act. No question was raised by the defendants as to whether they were mokarrari maurashi roiyats or whether the land held by them was one tenure or distinct raiyati holdings. The Settlement Court settled the rent on the footing that the land held by the tenants formed one tenure and that they were tenure-holders. In so doing they proceeded on the footing of the Record of Rights which had already been published. It was argued that the tenants should have raised the question in the proceeding u/s 105 and that, not having done so, section 109 of that Act operated so as to prevent them from maintaining the action. The learned Judges dealt with the point argued before them as follows: "With regard to the alternative declaration, the appellants contend that as the questions for determination might have been made the subject of controversy in the proceedings u/s 105, they cannot be investigated in the present suit. In our opinion, there is no force in this contention. Section 105A, no doubt, authorises the Settlement Officer in the course of proceedings u/s 105, for the settlement of fair and equitable rent to investigate questions which would otherwise be determined at the instance of the aggrieved party in a suit instituted u/s 106. But in the case before us no such question was raised or investigated in the proceeding u/s 105. Consequently, on a plain and literal reading of section 103, the position cannot be maintained that the present suit concerns a matter which has already been the subject of an application u/s 105. The appellant, however, urges us to put a wider construction upon section 109. He contends that, as in a case where section 11, Civil Procedure Code, is applicable, a question which might and should have been raised is deemed to have been raised and decided, we should hold u/s 109 that a matter has been the subject of an application u/s 105, whenever it might, if the defendant had so chosen, have been raised and decided u/s 105 read with section 105 A. We are of opinion that this contention is unsound. If we were to accept the construction put forward by the appellant, we should have to read into section 109 words which are not to be found there; we

cannot hold, on the analogy of the doctrine of constructive res judicata, that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided u/s 105 read with section 105 A."

7. I respectfully endorse the view of the learned Judges of the Calcutta High Court in the case already cited. To hold otherwise would be to say that the jurisdiction of the Civil Court is ousted not only when a matter had been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 both inclusive, but that it is also ousted where the matter might have, but was not, the subject of an application made, suit instituted or proceedings taken under those sections. In my opinion the decision of the learned Judge in the Court below is right and I would dismiss this appeal with costs.