
(1910) 06 CAL CK 0003
In the Calcutta High Court

Pandab Dowari Das and Others

APPELLANT

Vs

Ananda Kishun Chakravarti and Others

RESPONDENT

Date of Decision : 28-06-1910

Acts Referred:

Bengal Tenancy Act, 1885 — Section 105

Citation : 7 Ind. Cas. 102

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. The substantial question of law, which we are invited to decide in this appeal, relates to the true effect of Section 109 comprised in Chapter X of the Bengal Tenancy Act of 1885 as amended by Act III of 1898 B.C. and as it stood before the charges made by the Eastern Bengal and Assam Tenancy Amendment Act of 1908 came into force. The Court of appeal below, in reversal of the decision of the Court of first instance, has held that the effect of Section 109 is to bar all suits in Civil Court for declaration that entries made in a record-of-rights finally published u/s 103A, are erroneous, when such publication has been followed by an application by the landlord u/s 105 for settlement of fair and equitable rent in respect of the land entered in the record as held by the tenants. The circumstances under which this question arises for decision are not disputed, and are indeed all matters of record. The record-of-rights was finally published on the 13th December 1904; the landlords applied for settlement of fair and equitable rents u/s 105 on the 14th February, 1905. The Settlement Officer directed on the next day that the application was to be put up after expiry of the time for institution of a suit u/s 106. On the 18th March 1905, the Settlement Officer directed that as the time for commencement of proceedings under that section had expired and no objection had been preferred, the landlords might proceed with the application for the settlement of fair and equitable rents. On the 29th March 1905, the tenant commenced the action, out of which the present appeal arises, in the Court of the Munsif of Dacca, for declaration that the record-of-rights prepared by the Revenue officer and certain specified entries made therein

were not operative as against him. His allegations, in substance, were two-fold, namely, first, that the lands of his tenancy, which were exclusively held by him, had been erroneously recorded as the joint holding of himself and the pro forma defendant, and, secondly that while he was liable to pay a consolidated sum as rent for the lands of his tenancy to the principal defendants and their co-sharer, an entry had been made in the record to the effect that he was liable to pay rent separately to each of his landlords. On these allegations he prayed that the entries made in the record under Clauses (c), (d) and (e) of Section 102, which relate to the situation, quantity and boundaries of the lands, the names of the landlords, and the rent payable, might be declared inaccurate. The claim was resisted by the landlords-defendants, who, apart from objections on the merits, pleaded as a bar the absence of jurisdiction in a Civil Court to entertain a suit of this description. The Court of first instance overruled this objection, and held on the merits that the plaintiff was entitled to a declaration substantially in accordance with the prayers in the plaint. Upon appeal by the landlords, the learned District Judge has reversed this decision, and held that, as the landlords had commenced a proceeding u/s 105, it was not competent to the Civil Court, in view of the provisions of Section 109, to take cognizance of a suit for declaration that the entries in the record-of-rights were erroneous. In this view, the District Judge has allowed the appeal and dismissed the suit. The plaintiff has now appealed to this Court, and on his behalf, the decision of the District Judge has been assailed on the ground that the suit is maintainable, because it does not concern any matter which was, or had already been made, the subject of the application u/s 105. This position has been strenuously controverted on behalf of the landlords-defendants, and the learned Vakil, who has appeared to support the judgment of the District Judge, has further argued that the suit ought to be dismissed on two additional grounds, namely, first, that Section 106 of the Bengal Tenancy Act furnishes an exclusive remedy for amendment of the record, to which it is obligatory upon the tenant to have recourse if he challenges the correctness of any specific entries; and, secondly, that inasmuch as the proceeding commenced by the landlords u/s 105 has terminated and no appeal has been preferred against the order made therein, which, by virtue of Section 107, has the force and effect of a decree of a Civil Court in a suit between the parties, the present suit ought not to be entertained, as the plaintiff practically seeks to nullify the order u/s 105 which has now become final and conclusive. In our opinion, the view taken by the learned District Judge, and the grounds urged in support of his decision on behalf of the respondents are manifestly unsustainable.

2. In so far as the contention of the plaintiff-appellant is concerned, the question turns upon the true scope and effect of Section 109, which, before its amendment in 1908, was in the following terms:

Subject to the provisions 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 or suit instituted u/s 105, Section 106, Section

107, or Section 108.

3. It is fairly clear from the terms of this Section that the jurisdiction of the Civil Court is ousted only in respect of any matter which is or has already been the subject of a proceeding under any of the four Sections 105 to 108. The question, therefore, arises, whether the matter with which the present suit is concerned, is one which formed the subject of the application u/s 105. The learned Vakil for the plaintiff-appellant has contended that the only matter which formed the subject of the enquiry u/s 105 was the amount of fair and equitable rent to be settled in respect of the land held by the tenant, that the determination of such fair and equitable rent must have proceeded, as in fact it did proceed, on the basis of the entries made in the record-of-right, and that the question of the correctness of the entries raised in the present litigation did not, and could not, properly form the subject of enquiry u/s 105. In answer to this argument, it has been contended by the learned Vakil for the landlords-respondents that the determination of fair and equitable rent involves by implication a decision upon the question of the area of the land, of the status of the tenant and also of the amount of rent payable; and that, consequently, the proceeding u/s 105 indirectly comprises within its scope the matters in controversy in the present litigation. In our opinion, the contention of the appellant is well-founded and must prevail. It is clear from an examination of the provisions of Chapter X of the Bengal Tenancy Act, that there is a well-marked distinction between the scope of Section 105 and Section 106. Section 105 contemplates a settlement of fair and equitable rent after the existing conditions of the tenancy have been determined, and entries made in respect thereof in the record finally published u/s 103A. The proceeding u/s 105, therefore, assumes the correctness of these entries, which are taken as the foundation of the enquiry. Section 106, on the other hand, contemplates the institution of a suit before the Revenue Officer for the decision of disputes regarding entries made in the finally published record. From a logical point of view, the suit u/s 106 ought to precede the proceeding u/s 105, but the opposite course is rendered possible by the circumstance that whereas a suit u/s 106 may be commenced within three months from the date of the certificate of the final publication of the record-of-rights, the proceeding u/s 105 must be commenced within a shorter time, namely, two months from such date. It is conceivable, therefore, that a proceeding u/s 105 may be commenced first, and may be followed by a suit u/s 106. Now it is reasonably plain that in a proceeding u/s 105, if it is properly conducted, no question can, or ought to, arise for consideration which relates to the correctness of the entries made in the record. From this point of view, there is no room for controversy that the matters which require adjudication in the present (sic) were not, and could not, be the subject of the application u/s 105. It is worthy of note, however, that the practice of Revenue Officers has been contrary to the plain provisions of the statute, and that, as was pointed out in the case of *Pirithi Chand Lal v. Basarat Ali* 37 C. 30 : 10 C.L.J. 343 : 13 C.W.N. 1149 : Ind. Cas. 449 when an application has been made by a landlord for settlement of fair and equitable rent, the tenant is often

allowed to take objection which would properly come u/s 106 of the Act; in other words, although the tenant is not called upon to present a plaint for the institution of a suit u/s 106, his petition of objection is substantially treated as such a plaint, and the enquiry is held as if two proceedings, one u/s 105 and the other u/s 106, had been amalgamated. Reference may be made to *Shambhu Chandra Hazra v. Puma Chandra Pal* 35 C. 176 : 7 C.L.J. 103 : 12 C.W.N. 122, as an illustration of a case in which such irregular procedure was not allowed, and to *Kali Kishore v. Gopi Mohun* 9 C.L.J. 574 : 4 Ind. Cas. 62 as an example of a case in which proceedings under the two sections were practically mixed up. This procedure, however, cannot justify the conclusion that matters which fall appropriately within the scope of Section 106, but which, in accordance with an irregular practice, are allowed to be raised by way of objection in a proceeding u/s 105, are really matters which form the subject of an enquiry under the latter section, even though such questions are neither raised nor decided. To maintain the contrary view, one must ignore the clearly denned distinction between Sections 105 and 106. It may, further, be observed that the case before us is entirely free from difficulty, because the irregular procedure, to which reference has been made, was not adopted here. An examination of the judgment of the Revenue officer, u/s 105, shows that the landlords when they asked for settlement of fair and equitable rent, claimed to have the rent enhanced on three grounds, namely, increase of area, higher prevailing rate of rent in neighbouring villages, and rise in the average local prices of staple food crops. No evidence was adduced in support of the first and second grounds of enhancement, and the Settlement Officer decided, with regard to the third ground, that the rent ought to be raised by four annas six pies in the rupee. It is manifest, therefore, that the matters now in dispute were not the subject of enquiry in the application u/s 105; and consequently it cannot be held that Section 109 bars this suit. The learned Vakil for the landlords-respondents, however, placed reliance upon the case of *Durga Churn Law v. Hateen Mandal* 29 C. 252 in which it was ruled that a question between a landlord and a tenant, heard and decided by a Revenue Officer u/s 106 of the Bengal Tenancy Act before Chapter X was amended in 1898, is *res judicata* between the same parties in a subsequent suit, not only when the question relates to the status of the tenant, but also when it relates to the fair and equitable rent payable by him. This principle has clearly no direct application to the case before us, and as in 1898 the provisions of Chapter X were fundamentally altered, no useful purpose would be served by an examination and comparison of the provisions before and after the amendment. We feel no doubt whatever that a proceeding u/s 105, which deals solely with the question of fair and equitable rent, does not bar a Civil suit in which questions are raised as to the area and other incidents of the holding of the tenant. We may add that an endeavour was made by the learned Vakil for the respondents to induce us to consider the effect of Section 105 A, which was introduced by the Amending Bengal Act I of 1907, and Eastern Bengal and Assam Act I of 1908 respectively, and which substantially leaves it to the option of the tenant to institute a suit u/s 106 or to raise the questions triable in such a suit by way of

defence to a proceeding u/s 105; but what the effect of the new procedure may be is foreign to the present enquiry. In this view, the suit now before us is clearly maintainable. The learned Vakil for the respondents has, however, contended that there are two additional grounds upon which the suit ought to be dismissed, and the validity of these we must now proceed to consider.

4. The first bar, which the landlords-defendants seek to interpose to the suit, is that it is not maintainable inasmuch as the sole remedy of the tenant was by way of a suit u/s 106 of the Bengal Tenancy Act before the Revenue officer. The contention, in substance, is that when jurisdiction has been conferred on a special Court by statute, that Court alone can investigate the matters in controversy. In support of this principle, reliance has been placed upon the decision of this Court in the case of Bhandi Singh v. Ramadhin Rai 2 C.L.J. 359 : 10 C.W.N. 991 and reference has been made to the case of Jogendra Nath v. Krishna Pramada 35 C. 1013 : 12 C.W.N. 1032 : 8 C.L.J. 322 as an illustration of the application of this doctrine to Section 106 of the Bengal Tenancy Act. Now, it cannot be disputed that, as laid down in the case of Bhandi Singh v. Ramadhin Rai 2 C.L.J. 359 : 10 C.W.N. 991 and by a Full Bench of this Court in the case of Collector of Pabna v. Rama Nath Tagore B.L.R. (F.B.) Sup. Vol. 630 : 7 W.R. 191 if the Legislature creates an obligation to be enforced in a specific manner, as a general rule, performance cannot be enforced in any other way; in other words, as put by Lopes, L.J., in R v. Essex (1887) 18 Q.B.D. 704. in the case of an Act which creates a new jurisdiction, a new procedure, new forms, or new remedies, the procedure, forms, or remedies there prescribed and no others, must be followed. It may be assumed, therefore, that, if Section 106 stood by itself, it might be contended with good reason that a litigant was bound to avail, himself of the method prescribed there, and no other, for the determination of the correctness of entries in a finally published record-of-rights to which he took exception. But the Legislature has not left the matter in doubt; for Section 109 defines precisely the extent to which the jurisdiction of the Civil Court is ousted. As we have already held, the effect of that Section is to bar the jurisdiction of the Civil Court, not under all but, only under certain specified contingencies. The view, therefore, that Section 106 furnishes an exclusive remedy, cannot be maintained. The provisions of Sections 111 and 111A also militate against the view that the jurisdiction of the Civil Court has been completely taken away. But it has been strenuously contended by the learned Vakil for the respondents that this view is opposed to that taken by this Court in the case of Jogendra Nath v. Krishna Pramada 35 C. 1013 : 12 C.W.N. 1032 : 8 C.L.J. 322. No doubt, in that case it appears to have been broadly ruled that a suit in the Civil Court for the alteration and correction of certain entries made in a record-of-rights finally published under Chapter X of the Bengal Tenancy Act, is not maintainable. Upon an examination of the judgment, however, it becomes fairly clear that the attention of the learned Judges was not invited to the provisions of Section 109 of the Bengal Tenancy Act. The decision proceeds on the ground that Section 106 by itself justifies the conclusion that the remedy furnished by that Section is of

an exclusive character, and bars a suit in a Civil Court. That decision, therefore, cannot rightly be regarded as any authority upon the question of the true scope and effect of Section 109, which is the substantial question of law directly raised in the present appeal; consequently, a reference to a Pull Bench is not needed. We may further point out that the learned Judges proceeded on the ground that although the Bengal Tenancy Act was passed nearly a quarter of a century ago, no authority had been produced to show that a suit would lie in the Civil Court for amendment of the record-of-rights. As a matter of fact, an examination of the cases in the books shows that there is a long and uniform course of decisions which favour the view that a suit in Civil Court is maintainable, if the matter, upon which the decision of the Civil Court is sought, is not, or has not already been the subject of a suit u/s 106. [See *Troylokhy Nath v. Macleod* 28 C. 28; *Ashutosh Nath v. Abdool* 28 C. 676; *Agin Bindh v. Mohun Bikram* 30 C. 20 : 7 C.W.N. 314 : *Ram Gulam v. Bishnu Prakash* 11 C.W. N . 48; *Luchmi Persad v. Ekdeshwar* 13 C.W.N. 181 : 4 Ind. Cas. 577; *Sheo Nandan v. Bacha Ram Raut* 9 C.L.J. 284 : 4 Ind. Cas. 54]. Not only does therefore, the decision in *Jogendra Nath v. Krishna Pramada* 35 C. 1013 : 12 C.W.N. 1032 : 8 C.L.J. 322 ignore the effect of Section 109, but it overlooks also the earlier decisions to which reference has been made. We find, moreover, from the report of the case that, on behalf of the then appellant, reliance was actually placed upon two of the cases mentioned [*Troylokhy Nath v. Macleod* 28 C. 28 and *Ramgulam v. Bishnu Prakash* 11 C. W. N . 48], in the first of which the learned Judges considered in some detail the precise scope of Section 109; it is consequently difficult to appreciate how the effect of that Section came to be overlooked. We may also add that if the contention of the respondents were to prevail, we should practically have to alter the language used in Section 109, and read therein the words "which may or ought to be the subject of an application" instead of the clause "which is or has already been the subject of an application." An interpretation of the section, which leads to the consequence of this character, is obviously inadmissible. Lastly we observe that the decision in *Jogendra Nath v. Krishna Krishna Pramada* 35 C. 1013: 12C. W.N.1032; 8 C.L.J. 322 has been recently dissented from in the case of *Golab Misser v. Kala Nand Singh* 6 Ind. Cas. 217 With all respect, therefore, for the learned Judges who decided the former case, we regret we find ourselves unable to follow it, as it is, in our opinion, opposed to principle, to the express provisions of the statute, and also to a long current of decisions The first ground urged in bar by the respondent, must, therefore, be overruled.

6. In so far as the second ground urged as a bar is concerned, there is, in our opinion, no substance in it. It has been argued that as no appeal has been preferred against the order made by the Revenue Officer on the proceeding u/s 105, this suit should be dismissed, because, if the plaintiff were to succeed herein, he would indirectly be entitled to re-open the decree for settlement of fair and equitable rent, though he has lost his opportunity to do so by reason of his failure to prefer an appeal. This argument is obviously fallacious. If the plaintiff

had preferred an appeal against the order in the proceeding u/s 105, it would undoubtedly have proved infructuous. He had apparently no complaint to make against the order in so far as it enhanced the rent on the ground of a rise in prices. He could not consequently prefer an appeal on the ground that the enhancement allowed was unfair or inequitable. Nor could he prefer an appeal on the ground that the area of the holding, the name of the landlord entitled to receive the rent and the amount of rent payable before the application for enhancement was made, has been wrongly determined in that proceeding; if he had urged any such ground in a possible appeal by him, the Court of appeal could not have entertained it, much less given effect to it, as there were no materials on the record upon which these matters might be investigated. The suggestion, therefore, that he was bound to appeal against the order in the proceeding u/s 105, is wholly illusory. The plaintiff cannot be held to have acted erroneously because he omitted to adopt a course which would have been futile to a certainty. It is thus clear that the principle which has sometimes been recognized, namely, that the right of appeal from interlocutory orders ceases with the disposal of the suit has no application to the case before us. The decisions in *Madhu Sudan Sen v. Kamini*; 32 C. 1023 : 9 C.W.N. 895; *Mackenzie v. Narsingh Sahai* 36 C. 762 : 10 Cri.L.J. 113 : 2 Ind. Cas. 413 and *Kuriya Mal v. Bishambhar Das* 32 A. 225 : 7 A.L.J. 206 : 5 Ind. 234 may be taken as typical illustrations of this class of cases. They are based on a two-fold ground, namely, first, that, when a party has elected to take the benefit of an interlocutory order, he cannot at the same time by an appeal against such order nullify the final decree which he omits to challenge directly, and, secondly, that when a final decree has been made, the party aggrieved ought at that stage to prefer an appeal against that decree, as in such appeal the propriety of an interlocutory order also may be questioned. Neither of these principles has obviously any application to the circumstances of the case before us. The plaintiff is plainly in no way barred by the doctrine of election, nor could he, as we have conclusively shown, obtain, by an appeal against the order in the proceeding u/s 105, a determination of the question raised in this suit. It is further worthy of note that the assumption made by the respondents that the effect of the success of the plaintiff necessarily involves, by an indirect method, the practical reversal of the order u/s 105, is wholly fallacious; even though the plaintiff succeeds in the present suit, the essential portion of the decision in that proceeding must stand untouched. In so far as that decision holds that the rent is liable to be enhanced at the rates of 4 annas 6 pies in the rupee, it cannot, by any possibility, be affected by the decision in this suit. No doubt, the arithmetical calculation of the actual amount of the enhanced rent may be varied, if it is determined in the present suit that the existing rent is different from what is entered in the finally published record. Such arithmetical calculation, however, cannot rightly be regarded as an essential portion of the decision u/s 105. Hence the second ground urged on behalf of the respondent clearly does not present an effective bar to the maintenance of the suit.

7. The result, therefore, is that this appeal must be allowed, the judgment and decree of the District Judge set aside and the case remanded to him in order that the appeal may be heard on the merits. The appellant is entitled to his costs both here and in the Court of appeal below. The costs in the Court of first instance as also the costs after remand will abide the result.

8. Nos. 2004-2006, 2008-2014, 2054-2056 and 2503 of 1907.

9. These appeals are governed by our decision in appeal from appellate decree No. 1758 of 1907.

10. The result is that the judgment and decree of the District Judge in each case are reversed and the case remanded to him to be heard on the merits. There will be the same order as to costs in each case, as in appeal from appellate decree No. 1758 of 1907. No. 2007 OF 1907.

11. This appeal has admittedly abated, and a declaration to that effect will be made. There will be no order as to costs.