APPELLATE CIVIL.

Before Walmsley and B. B. Ghose JJ.

SASI KANTA ACHARJYA.

v.

SALIM SHEIKH.*

1923

Feb. 27.

Settlement of Rent—Bengal Tenancy Act (VIII of 1885), s. 105, application under—Withdrawal of application, effect of—S. 109, Bengal Tenancy Act, if and when bars a subsequent suit in Civil Court—Revenue officer, if has jurisdiction to grant leave to sue in a Court of different jurisdiction.

Where the plaintiff made an application under s. 105 of the Bengal Tenancy Act before the Revenue Officer with regard to a number of holdings and subsequently prayed for permission to bring suits in the Civil Court against those defendants who had not compromised and that the case might be disposed of in accordance with the compromise as against the others, which prayer was granted :

Held, that a subsequent suit in the Civil Court was not maintainable under s. 109 of the Bengal Tenancy Act.

Held, further, that there was no provision in the Bengal Tenancy Act that an application made under s. 105 and subsequently withdrawn had this effect that such an application had never been made.

Abeda Khatun v. *Majubali Chowdhury* (1) followed.

Cheodditti v. *Tulsi Singh* (2), *Aswini Kumar Aich* v. *Saroda Charan Basu* (3), *Kamini Sundari* v. *Abdul Habin* (4) and *Soroj Kumar Acharji* v. *Umed Ali Howladar* (5) distinguished on the ground that the subject matter of the two proceedings in those cases were different in which case s. 109 would not bar a subsequent suit.

* Appeals from Appellate Decrees, Nos. 106 to 108 and 1016 of 1921, against the decrees of Atul Chandra Banerjee, Subordinate Judge of Mymensingh, dated Sep. 13, 1920 modifying the decrees of Trailokya Nath Roy, Munsif of Mymensingh, dated Jan. 30, 1920.

(1) (1920) I. L. R. 48 Calc. 157 ; 24 C. W. N. 1020.
(2) (1912) I. L. R. 40 Calc. 428.
(3) (1916) 24 C. L. J. 79.
(4) (1918) 28 C. L. J. 254.
(5) (1921) 25 C. W. N. 1022.

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SECOND APPEALS by Maharaja Sasi Kanta Acharjya Bahadur, the plaintiff.

These four appeals arose out of as many suits for recovery of rent at the rates alleged to have been payable originally together with enhancement at the rate of 6 annas per rupee, on the ground of increase in the price of staple food crops. The plaintiff also claimed cess and damage. The defence *inter alia* was that the plaintiff was not entitled to enhancement as claimed, that the defendants having paid rent at uniform rates for over 20 years before suit they were not liable to pay enhanced rates, that the plaintiff having withdrawn his applications under section 105 of the Bengal Tenancy Act, his claims for enhancement were untenable. The Court of first instance allowed enhancement at 4 annas per rupee and decreed the suits accordingly. On appeal by the defendants, the learned Subordinate Judge held that inasmuch as the plaintiff had withdrawn his previous applications under section 105 of the Bengal Tenancy Act, the present suits were not maintainable under section 109 of the Act and dismissed the suits.

Babu Jogesh Chandra Roy (with him *Babu Nagendra Nath Bose*), for the appellant. There are conflicting decisions on the point involved in these appeals. The rulings in *Cheodditti* v. *Tulsi Singh* (1), *Aswini Kumar Aich* v. *Saroda Charan Basu* (2), *Kamini Sundari* v. *Abdul Habin* (3) and *Soroj Kumar Acharji* v. *Umed Ali Howladar* (4) are in my favour. The only decisions against me are *Abeda Khatun* v. *Majubali Chowdhury* (5) and an unreported decision by Mookerjee and Walmsley JJ. in

(1) (1912) I. L. R. 40 Calc. 428.
(2) (1916) 24 C. L. J. 79
(3) (1918) 28 C. L. J. 254.
(4) (1921) 25 C. W. N. 1022.
(5) (1920) I. L. R. 48 Calc. 157 24 C. W. N. 1020.

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S. A. 1378 of 1919 on 16th January, 1923. But they are distinguishable. In view of the conflict of judicial opinion I submit it is a fit case for reference to a Full Bench.

Babu Radhabenode Pal, for the respondents. The cases cited by my friend are all distinguishable. The decision in *Abeda Khatun* v. *Majubali Chowdhury* (1) and the unreported decision of Mookerjee and Walmsley JJ. are in point. I submit there is no conflict of judicial opinion.

Babu Jogesh Chandra Roy, in reply.

GHOSE J. These appeals arise out of as many suits for rent at an enhanced rate on several grounds stated in the plaints. The Munsif made a partial decree in favour of the landlord, the plaintiff. On appeal by the defendants, the Subordinate Judge has dismissed the claim for enhancement on the ground that the suit for enhancement is not maintainable under the provisions of section 109 of the Bengal Tenancy Act, the landlord having made applications under section 105 of the Act before the Revenue Officer, on the authority of the case of *Abeda Khatun* v. *Majubali Chowdhury* (1). The learned vakil for the appellant argues before us that there is a difference of opinion with regard to the construction of section 109, and contends that the case of *Abeda Khatun* v. *Majubali Chowdhury* (1) is distinguishable from the present case and that the other cases relied on by him support his contention that such a suit is maintainable, notwithstanding the provisions of section 109 of the Bengal Tenancy Act. Before deciding the question it seems to me that it is necessary to look into the provisions of section 109

(1) (1920) I. L. R. 48 Calc. 157 ; 24 C. W. N. 1020.

of the Act in order to see whether the present suit for enhancement is maintainable. What happened in this case was that the plaintiff presented an application under section 105 of the Bengal Tenancy Act before the Revenue Officer with regard to a number of holdings. Then, on the 18th of September, 1917, he presented a petition before the Revenue Officer to the effect that certain of the tenants whose holding had been recorded in a number of *khatians* had compromised the suit but certain other tenants among whom are the present defendants did not appear for the purpose of coming to a compromise and he prayed that permission might be granted to him to bring suits in the Civil Court against the defendants who had not compromised and that the case might be disposed of according to the compromise entered into by the others. On this petition, the Revenue Officer made this order: "Plaintiff "files a petition for permission to withdraw cases "against the defendants of Khatians Nos. 172, 196, etc. "The prayer is allowed. Other defendants have "compromised. Put up on 27th September, 1917, "for judgment". In the judgment, nothing further is said to with regard to those defendants who did not compromise. Now, section 109 of the Bengal Tenancy Act runs thus: "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, suit instituted or proceedings "taken under sections 105 to 108 (both inclusive)". There cannot be any doubt that this matter, which is now for decision in the Civil Court, was a matter which was the subject of an application made under section 105 of the Bengal Tenancy Act. The contention is that when the application under section 105

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was withdrawn against these defendants, the operation of section 109 cannot come into play, or, in other words, the contention is that, unless there has been a decision on the application by the Revenue Authority, it is open to the party who made the application to bring a suit in the Civil Court with regard to the same subject matter. It seems to me that to accept such a contention would be to make an addition to the section and to read the words "subject of an "application made" as if they stand for "subject of a "decision", which in my judgment, we cannot do. Therefore, apart from authorities, it would seem that the decision of the learned Subordinate Judge is right as regards the true construction of section 109 of the Bengal Tenancy Act. It is contended, however, by the learned vakil for the appellant that a number of cases have been decided the other way and that this matter should be referred for decision to a Full Bench. The cases to which he refers are these: *Cheodditti* v. *Tulsi Singh* (1), *Aswini Kumar Aich* v. *Saroda Charan Basu* (2), *Kamini Sundari* v. *Abdul Habin* (3) and *Soroj Kumar Acharji* v. *Umed Ali Howladar* (4). In the case of *Cheodditti* v. *Tulsi Singh* (1), the learned Judges, although they expressed an opinion in favour of the contention now advanced by the learned vakil for the appellant, said this: "Moreover, it cannot well be said that the subject "matter of the application made in 1906 and the "subject matter of the suit brought in 1909 are the "same". If the subject matter of the two proceedings were different, then the suit was certainly maintainable and section 109 of the Bengal Tenancy Act would not prevent a party from bringing a suit. That case is, therefore, distinguishable from the present case

(1) (1912) I. L. R. 40 Calc. 428.
(2) (1915) 24 C. L. J. 79.
(3) (1918) 28 C. L. J. 254.
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and the observations made therein do not prevent us from taking a different view. The same may be said of the case of *Aswini Kumar Aich.* v. *Saroda Charan Basu* (1). The learned Judges in that case said this: "These matters are entirely foreign to the jurisdiction of the Revenue Officer under section 106, his work being confined to a decision of the point whether the entry in the record of rights is correct or not". Similarly, in the case of *Kamini Sundari* v. *Abdul Habin* (2), the learned Judges observed as follows: "We are unable to agree with him (that is, the Subordinate Judge) in this opinion as it seems to us that the subject matter of the suit under section 106 and the subject matter of the present suit are entirely different". The case of *Soroj Kumar Acharji* v. *Umed Ali Howladar* (3) apparently follows the previous cases and the case of *Abeda Khatun* v. *Majubali Chowdhury* (4) is distinguished on the ground that, in that case, there was no permission to withdraw the suit with leave to bring a fresh suit. It may be said that in the present case also there was no such leave granted. It may be a question, as was raised in the case of *Soroj Kumar Acharji* v. *Umed Ali Howladar* (3), that, even if such leave were granted, whether the Revenue Officer had any jurisdiction to grant leave to bring a suit in a Court of different jurisdiction. There is no provision, however, in the Bengal Tenancy Act that an application made under section 105 and subsequently withdrawn has this effect, that such application had never been made. It is only the Legislature that can wipe out the effect of an application made by reason of its being withdrawn and we cannot supply what may possibly be

(1) (1916) 24 C. L. J. 79.
(2) (1918) 28 C. L. J. 254.
(3) (1921) 25 C. W. N. 1022.
(4) (1920) I. L. R. 48 Calc. 157; 24 C. W. N. 1020.

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an omission of the Legislature in not making such a provision. With great respect, therefore, I am unable to accept the opinion expressed in some of the cases that an application made and withdrawn has the effect as if the application had never been made. There does not appear to be any binding decision to the contrary on the question involved in these cases. On the other hand, the facts in *Abeda Khatun* v. *Majubali Chowdhury* (1) closely resemble the facts in the cases before us. The appeals must, therefore, be dismissed and with costs in those cases in which the respondents have entered appearance.

WALMSLEY J. I agree.

B. M. S. *Appeals dismissed.*

(1) (1920) I. L. R. 48 Calc. 157 ; 24 C. W. N. 1020.

CRIMINAL REVISION.

Before Greaves J.

1923

March 6.

NAGENDRA NATH BOSE

v.

EMPEROR.*

Autrefois Acquit—Acquittal on trial for criminal breach of trust of a sum between certain dates—Subsequent trial for criminal breach of trust of a separate sum during the same period—Misappropriation of latter not known to the prosecutor on the former trial—Second prosecution not barred—Criminal Procedure Code (Act V of 1898) s. 403.

An acquittal on a charge, under s. 409 of the Penal Code, of criminal breach of trust of a certain sum of money committed between two specified dates, does not bar, under s. 403 of the Criminal Procedure Code, a subsequent trial for criminal breach of trust, committed on an intermediate date, of a separate sum which was not included in the amount, forming

* Reference to a third Judge from the dissentient judgments of Newbould and Suhrawardy JJ. in Criminal Revision No. 1098 of 1922.