

section should be strictly complied with. As that has not been done in this case we are of opinion that the judgment of the lower Appellate Court is right and the appeal must be dismissed with costs.

G. S.

*Appeal dismissed.*

1924

GANGAMANI  
BISWAS  
v.  
RABJA ALI  
CHAUKIDAR.

---

## APPELLATE CIVIL.

---

*Before Neubould and B. B. Ghose JJ.*

### OFFICIAL TRUSTEE OF BENGAL

v.

### BENODE BEHARI GHOSE MAL.\*

1924

April 11.

*Appeal—Summary dismissal—Review—Ex parte restoration—Paddy rent—Money value, whether to be calculated as in lease or according to market rate—Civil Procedure Code (Act V of 1908) O. XLI, r. 11. and O. XLVII, r. 4 (a).*

Where an appeal was at first summarily dismissed under Order XLI, rule 11 of the Code of Civil Procedure, and then on the appellant's application for review the same Bench cancelled that order and directed that the appeal should be heard, this last order being passed *ex parte* ;

*Held*, that this procedure which had been followed in numerous cases in the High Court for over 40 years should not be changed though departed from in one or two solitary instances.

*Janoki Nath Hore v. Prabhasini Dasee* (1) followed.

*Abdul Hakim Chowdhury v. Hem Chandra Das* (2) dissented from.

Where a lease contained the following clause "settling as rent thereof Rs. 87 in cash and 2 bishas  $5\frac{1}{2}$  aris of *gula* paddy or its price Rs. 45-8 as., total Rs. 132-8 as :—

*Held*, that the use of the word "or" distinguished that lease from many others which had been considered in reported cases, and the tenant

\*Appeal from Appellate Decree, No. 178 of 1922, against the decree of Kali Prasanna Sen, Subordinate Judge of 24-Perganas, dated Sep. 19, 1921, affirming the decree of Biman Behari Sarkar, Munsif of Barasat, dated Feb. 26, 1920.

(1) (1915) I. L. R. 43 Calc. 178. (2) (1914) I. L. R. 42 Calc. 433.

1924  
 OFFICIAL  
 TRUSTEE OF  
 BENGAL  
 v.  
 BENODE  
 BEHARI  
 GHOSE  
 MAL.

was justified, if he preferred it, as he would naturally do when the price of paddy rose, to pay the money value fixed in the lease in lieu of the paddy in kind.

SECOND APPEAL by the Official Trustee of Bengal, the plaintiff. In this suit which was for recovery of arrears of rent payable partly in kind and partly in cash for the years 1322 B. S. to 1325 B. S. the plaintiff valued the paddy rent at the then market rate. The defendants Nos. 2 and 3 appeared and contested the suit. They pleaded *inter alia* that the suit was not maintainable for non-specification of the boundaries of the "rent land", that the suit was barred by *res judicata* so far as the claim for rent for the years 1322 and 1323 was concerned, that the amount of rent payable had been fixed and consolidated at Rs. 66-4 *per* year, that the plaintiff was not entitled to get the current market price for the paddy rent and that the suit was bad for misjoinder of the defendant No. 1. The learned Munsif, 1st Court, Barasat, having decreed the suit for rent at the rate of Rs. 66-4 *per* year, the plaintiff preferred an appeal which was dismissed, and he thereupon preferred this second appeal to the High Court. On the 7th April 1922 this appeal was dismissed summarily by Walmsley and Suhrawardy JJ., who cancelled this order on 5th July 1922, and made a new *ex parte* order on the appellant's application for review.

*Babu Rishindra Nath Sarkar*, for the respondents. I have a preliminary objection as to the competency of the appeal. This appeal was dismissed under Order XLI, rule 11, but on a review of judgment the order of dismissal was set aside and the appeal was admitted under Order XLI, rule 11, without issuing any notice to the respondents as required by Order XLVII, rule 4(a). I rely upon the

decisions in *Abdul Hakim Chowdhury v. Hem Chandra Das* (1), *Bhismadeo Das v. Sita Nath Ray* (2) and *Tikait Ajant Singh v. F. T. Christien* (3),

[NEWBOULD J. Are the respondents "opposite parties" as contemplated in the said rule?]

Yes. *First*, because in the petition for Review the appellants made the respondents opposite parties. *Secondly*, because there is no other provision in the Code which provides for service of notice in cases in which the respondents have not appeared. That rule is the only provision and covers all possible cases. There cannot be any difference in cases for hearing under Order XLI, rule 11, or in cases in which the respondent did not appear at the final hearing, or in cases in which the respondent contested the case. The opposite party in that rule means the party who will be prejudiced by the *ex parte* order. In support of this contention I rely on the decision in *Tikait Ajant Singh v. F. T. Christien* (3) and *Muhammad Zahiruddin v. Nuruddin* (4) cited in *Janoki Nath Hore's case* (5).

[GHOSE J. Can this Bench revise the order of another Division Bench?]

No. But this order of that Division Bench in question is a nullity. I rely upon the case of *Abdul Hakim Chowdhury v. Hem Chandra Das* (1). As there is a difference of opinion on this point, the matter should be referred to a Full Bench if the *ex parte* order is not treated as a nullity. In similar circumstances my Lord the Chief Justice issued a Rule. One such case is reported in *Saila Bala Debi v. Gadadhar Hazra* (6).

[The preliminary objection was overruled.]

(1) (1914) I. L. R. 42 Calc. 433. (4) (1903) 14 Maj. L. J. 7.

(2) (1912) 17 C. W. N. 42, 44. (5) (1915) I. L. R. 43 Calc. 178.

(3) (1912) 17 C. W. N. 862, 863. (6) (1922) 27 C. W. N. 918.

1924

OFFICIAL  
TRUSTEE OF  
BENGAL  
v.  
BENODE  
BEHARI  
GHOSE MAL.

*Babu Brojo Lal Chakravarti* (with him *Babu Santosh Kumar Bose*) for the appellant. This appeal arises out of a suit for rent payable partly in cash and partly in paddy. On the true and correct construction of the potta the value of the paddy rent should be calculated according to the then prevailing market value thereof. There are rulings of this Court both in favour of and against the appellant and so this case ought to be referred to the Full Bench.

*Babu Rishindra Nath Sirkar*, for the respondents, was not called upon to reply.

NEWBOULD AND GHOSE JJ. In this appeal a preliminary objection has been taken that no appeal lies. The appeal was at first summarily dismissed under Order XLI, rule 11, C. P. C. Then on an application for review made by the appellant the same Bench cancelled that order dismissing the appeal summarily and directed that the appeal should be heard. This order was passed *ex parte*, and it is contended that it should be therefore treated as null and void. The point now raised has been considered by this Court in the case of *Abdul Hakim Chowdhury v. Hem Chandra Das* (1), and also in the case of *Janaki Nath Hore v. Prabhasini Dasee* (2). The latter decision dissents from the former and we have no hesitation in following the latter. We agree that the procedure which has been followed in numerous cases in this Court for over 40 years should not be changed although it was departed from in one or two solitary instances.

As regards the merits of the appeal the question that arises is one that is frequently the subject of dispute between landlord and tenant. The tenant holds on a lease under which he agreed to pay his rent partly in cash and partly in kind and there are

(1) (1914) I. L. R. 42 Calc. 433. (2) (1915) I. L. R. 43 Calc. 178.

conditions in the lease as to the payment of cash in lieu of the rent in kind. The question is whether the landlord is entitled to get the market price of the paddy portion of the rent or the price as stated in the lease. The essential sentence in the main body of the lease is :—“settling as rent thereof Rs. 87 in cash and 2 bishas and 5½ aris of *gula* paddy or its price Rs. 45-8, total Rs. 132-8”. In our opinion the use of the word “or” in this passage distinguishes this lease from many others which have been considered in reported cases, and it is unnecessary to refer to these cases. We hold that under this condition the tenant is entitled, if he prefers it, as he would naturally do when the price of paddy rises, to pay the money value fixed in the lease in lieu of the paddy in kind. Having regard to this passage in the main portion of the lease we are unable to accept the contention that the later passage which provides that the tenant shall be liable to pay as the price of the paddy the sum of Rs. 45-8 aforesaid is absolutely conditional on the special circumstances mentioned in the sentence.

The result is that the appeal is dismissed with costs.

G. S.

*Appeal dismissed.*

1924  
 OFFICIAL  
 TRUSTEE OF  
 BENGAL  
 v.  
 BENODE  
 BEHARI  
 GHOSE MAL.