APPELLATE CIVIL.

Before Suhrawardy and Mukerji JJ.

MAHENDRA NATH SASMAL 1925

v. Dec. 11.

PRABAL CHANDRA MUKHERJEE.*

Rent, suit for—Bengal Tenancy Act (VIII of 1885) ss. 105, 106, 109—Proceedings for correcting wrong entries regarding rent in the record-of-rights, dismissed for default—Subsequent suit claiming usual rents, if barred—Order of dismissal, if operates as res judicata.

Where two suits were instituted claiming rent for two separate holdings and the defence taken was that there was a single holding with a much lower rent as shown in the record-of-rights and that the suits were barred under s. 109 being the subject matter of previous proceedings under ss. 105 and 106 which were dismissed for default:—

Held, that a suit for rent is for relief against an alleged grievance which the plaintiff is entitled to institute under the general law, and it is not concerning any matter which may form the subject of an application or suit under section 105 or 106.

That the dismissal for default not being an adjudication on the merits did not amount to a decision so as to operate as *res judicata* and a bar to the suits.

Purna Chandra Chatterjee v. *Narendra Nath Chowdhury* (1), *Parbati* v. *Tulsi Kapri* (2) referred to.

SECOND APPEAL by Mahendra Nath Sasmal and others, the defendants.

These two appeals arose out of two suits for rent against the same defendants on the allegation that there were two holdings, the jama for one being

* Appeals from Appellate Decrees. Nos. 1916 and 1917 of 1923, against the decree of Jitendra Prasad Chatterjee, Subordinate Judge of Midnapore, dated March 7, 1923, reversing the decree of Shyamlal Basu, Munsif of Tamluk, dated Feb. 13, 1923.

(1) (1925) 29 C. W. N. 755. (2) (1913) 18 C. W. N. 604.

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Rs. 19 and annas 3 and for the other being Rs. 3 and annas 3; the defence was that the jama for both the holdings was Rs. 15 annas 10 and gandas 5 as was shown by the record-of-rights; the Court of first instance dismissed the suits holding that the plaintiff was not entitled to the two separate rents claimed and that the suits were barred under section 109 of the Bengal Tenancy Act as proceedings were instituted under sections 105 and 106 of the Act by the plaintiff and were then dismissed for default; the plaintiff appealed and the decision of the trial Court was reversed by the Subordinate Judge, the defendants thereupon preferred these Second Appeals before the High Court.

Mr. S. C. Maity and *Mr. Apurba Chandra Mukerjee*, for the appellants. These were proceedings under sections 105 and 106 to alter the record-of-rights and they were dismissed for default, the plaintiff can not now be allowed to get rid of the entries by this round-about method, these suits are not maintainable, and are barred under section 109, Bengal Tenancy Act, further the order of dismissal operates as *res judicata* by reason of the provisions of section 107, Bengal Tenancy Act.

Mr. Shib Chandra Palit and *Mr. Sarasija Kanta Palit*, for the respondent. This is a suit for rent, no correction of record-of-rights is prayed for, the subject matter is not the same as in the proceedings under sections 105 and 106; no decision was given in those proceedings, sections 109 and 107 do not apply.

SUHRAWARDY AND MUKERJI JJ. These two appeals arise out of two suits for rent which were decreed by the trial Court but were dismissed on appeal. The suits were for two jamas, one being alleged to bear a rental of Rs. 19-3 annas and the other

of Rs. 3-3 annas, and the claims were laid on the basis of the said rentals as the plaintiff had previously obtained decrees at the said rates for the said two jamas. Subsequent to the said decrees the record-of-rights was published in which one jama of Rs. 15-10-5g. was recorded for both the holdings. The plaintiff then applied under sections 105 and 106 of the Bengal Tenancy Act but the applications were dismissed for default. The Munsif dismissed the suits holding that section 109 of the Bengal Tenancy Act is a bar to the maintainability of the claim. The Subordinate Judge has reversed that decision and decreed the suit. Hence these appeals by the defendants.

It is contended on the authority of the decision of the Full Bench of this Court in the case of *Purna Chandra Chatterjee* v. *Narendra Nath Chowdhury* (1), that the suits for rent are not entertainable by reason of the provisions of section 109 of the Bengal Tenancy Act. That decision applied to the facts of these cases would support the position that notwithstanding the dismissal for default of the applications under sections 105 and 106, a Civil Court shall not entertain any application or suit concerning any matter which was the subject of those applications. A suit for rent is for relief against an alleged grievance which the plaintiff is entitled to institute under the general law. It is not concerning any matter which may form the subject of an application or suit under section 105 or section 106. It is true that in dealing with the defence in the present suits, the Court has to decide on matters which were the subject of the said applications, but as was pointed out in the case of *Rajendra Narain* v. *Sheikh Kalim* (2), section 109 is only a bar to the entertainment of an application or suit and not the entertainment of a defence to an action.

(1) (1925) 29 C. W. N. 755. (2) (1922) I. L. R. 49 Calc. 875.

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It is next contended that the orders dismissing the applications for default operate as bar to the trial of the very same question in the present suits by reason of the provisions of section 107 of the Act, but the short answer to this contention is that that section only makes the procedure as laid down in the Code of Civil Procedure for the trial of suits applicable to proceedings under sections 105 and 106 of the Act, and as regards the decision in those proceedings operating as a decree, the orders purported to dismiss the application for default without there being any adjudication on the merits and therefore do not amount to a decision : *Parbati* v. *Tulsi Kapri* (1). The effect of such dismissal is to leave the record-of-rights as it was finally published, but the record creates no title in favour of anybody, and only raises a presumption as to the correctness of the entry therein to avoid which it is not necessary to institute a suit. The record is always a rebuttable piece of evidence. In the present case, the learned Subordinate Judge has found that the entries are incorrect and have been rebutted.

Both the contentions failing, the appeals must be dismissed with costs.

A. S. M. A. *Appeal dismissed.*

(1) (1913) 18 C. W. N. 604.