APPELLATE CIVIL.

Before Rankin C J. and Mitter J.

1927

July 13.

SAJJAD AHAMAD CHAUDHURY

v.

TRAILAKHYA NATH CHAUDHURY.*

Rent, suit for—Decision of revenue officer, effect of—Ex parte decree—Rent, suspension of—Bengal Tenancy Act (VIII of 1885), ss. 105, 107.

A decree under s. 105 of the Bengal Tenancy Act, so long as it stands, is conclusive between the parties in suit on the questions of the area and the rent of the holding and the fact that the decree is an *ex parte* one does not take away from the effect of the decree.

Dharani Mohan Ray v. *Asutosh Mukerji* (1), relied on.

The defence of suspension of payment of rent, is applicable only where the rent is a lump rent for the whole land leased, treated as an indivisible whole, but where, a decision under section 105 of the Bengal Tenancy Act as regards the area and rent of a land demised is contrary to this view the defence is barred by section 107 of that Act.

Katyayani Debi v. *Udoy Kumar Das* (2) relied on.

Payment of rent for several years after dispossession from a part of the land demised does not operate as an estoppel against the defendants and debar them from raising the question of suspension of rent.

APPEAL FROM APPELLATE DECREE by the plaintiffs.

This appeal arose out of a suit for rent, cess and damages due for the years 1325 to 1328 B. S. The *jama* claimed was Rs. 18-5-9, that being the *jama* settled by the revenue officer under section 105 of the Bengal Tenancy Act.

* Appeal from Appellate Decree, No. 306 of 1925, against the decree of Nitai Charan Ghose, Subordinate Judge of Murshidabad, dated Sep. 12, 1924, reversing the decree of Jitendra Nath Sen, Munsif of Jangipur, dated March 29, 1923.

(1) (1923) 40 C. L. J. 34.

(2) (1924) I. L. R. 52 Calc. 417; L. R. 52 I. A. 160.

The contesting defendants raised, among others, the plea of suspension of rent on the ground that the plaintiffs had dispossessed them from a part of the land demised before the commencement of the settlement operations.

The Court of first instance disallowed the plea of suspension of rent and decreed the suit in part.

On appeal by the contesting defendants, the Subordinate Judge set aside the judgment and decree of the primary Court and dismissed the suit.

Hence this appeal by the plaintiffs.

Mr. Bankim Chandra Mukherjee (with him *Babu Purna Chandra Chatterjee* and *Babu Charu Chandra Ganguli*), for the appellants. The landlords do not claim any rent for the land, from the lands from which the tenants say, they have been dispossessed. In the settlement proceeding under s. 105 of the Bengal Tenancy Act, the revenue officer assessed fair and equitable rent for the lands in the possession of the tenants. The tenants cannot claim suspension of rent so long the decision of the Settlement Officer stands. The question is *res judicata* and the tenant is estopped from raising that question.

Babu Pyari Mohan Chatterjee, for the respondents. There is the finding of fact that the landlord has dispossessed my clients from a portion of the lands of the original tenancy. The rent was a lump sum for the entire land demised, viz., Rs. 15 odd. The learned Subordinate Judge was, therefore, quite right in holding that plaintiffs had made out no case for a proportionate reduction. See *Tarap Sheikh* v. *Kunja Behary Roy Chowdhury* (1), following *Katyayani Debi* v. *Udoy Kumar Das* (2) and *Suresh Chandra Samaddar* v. *Mathura*

(1) (1926) 44 C. L. J. 191.

(2) (1924) I. L. R. 52 Calc. 417; L. R. 52 I. A. 160.

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Nath Gain (1). The order of the settlement officer settling fair and equitable rent was made *ex parte*. Hence, it is not a decision within the meaning of s. 107 of the Bengal Tenancy Act and cannot have the force and effect of a decree operative as *res judicata*. *Parbati* v. *Toolshi Kapri* (2), followed in *Priyambada Debi* v. *Priya Nath Banerjee* (3). Nor can it bar the suit under s. 109 of the Bengal Tenancy Act.

The question whether rent was recoverable or liable to be suspended by reason of dispossession by the landlords did not arise for consideration by the settlement officer, who had only to settle fair and equitable rent. That was a question for the Civil Court to decide when trying a suit for rent. In *Apurba Krishna Roy* v. *Shyama Ch. Paramanik* (4), there was a direct issue, though it was decided *ex parte*. In *Dharani Mohan Ray* v. *Asutosh Mukerji* (5), there was also an issue raised, which was decided by compromise. But where the question is not raised at all and is not a proper issue in a proceeding under s. 105 of the Bengal Tenancy Act, the *ex parte* order, manifested only by what is said to be a decree (a tabular statement of the result of the proceedings) cannot be a bar to the investigation of the point. See *Basanta Kumari Debi* v. *Beni Madhab Mahapatra* (6).

It appears that the revenue officer allowed enhancement of the original rent for the entire area under s. 30 (*b*) of the Bengal Tenancy Act without any regard to the alleged dispossession, and diminution of the original area was neither brought to his notice nor considered by him in settling rent for the reduced area.

(1) (1925) 42 C. L. J. 66.
(2) (1913) 18 C. W. N. 604.
(3) (1925) 43 C. L. J. 327.
(4) (1919) 24 C. W. N. 223.
(5) (1923) 40 C. L. J. 34.
(6) (1926) All-Ind. Rep. Calc. 1058.

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Mr. Mukherjee in reply. The decision of the revenue officer under s. 105 of the Bengal Tenancy Act has the force and effect of a decree of the Civil Court and is final under s. 107 of the Act. The fact that the decision was passed *ex parte* does not take away the force of the decree under s. 107. Where a question has been necessarily decided in effect, though not in express terms, between the parties to a suit, they cannot raise the question as between themselves in any other suit in any other form : *Apurba Krishna Roy* v. *Shyama Ch. Paramanik* (1). The language of s. 105 is clear as to how far the decision of the revenue officer is final. It is final so far as the fair and equitable rent is settled for the land held by the tenant. In settling the rent, the revenue officer must have taken into consideration the land in possession of the tenant. No rent has been assessed for the portion not in the possession of the tenant. See *Dharani Mohan Ray* v. *Ashutosh Mukerji* (2).

Cur. adv. vult.

MITTER J. This is an appeal from a judgment and decree of the Subordinate Judge of Murshidabad, dated the 12th September, 1924, which reversed a judgment and decree of the Munsif of Jangipur, dated the 29th of March, 1923.

The appellants brought a suit against the respondents for recovery of arrears of rent, cess and damages for the years 1325 to 1328 B. S. at the rate of Rs. 18-5-9 pies per year. The main defence of the respondents was that there should be entire suspension of rent, as the appellants dispossessed the respondents from 5 *bighas* and 8 *cottahs* of land and that the holding in respect of which the rent suit was brought consisted of 25 *bighas* and odd and was held at a rental of

(1) (1919) 24 C. W. N. 223. (2) (1923) 40 C. L. J. 34.

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Rs. 15-6-11 *gandas*. The defence also alleged that there should, in any event, be proportionate reduction of rent.

The Munsif decreed the suit in part. He allowed the claim for 1325 B. S. at the rate of Rs. 15-6-11 *gandas* and that of the other years at the rate of Rs. 18-5-9 pies in addition to cess and damages at the rate of 12½ per cent.

Appeal was taken by the defendants-respondents to the Court of the Subordinate Judge, who reversed the decision of the Munsif and dismissed the plaintiffs' (now appellants') suit with costs. The lower Appellate Court came to the conclusion that the defendants were dispossessed from 4 *bighas* and odd of land before the commencement of the settlement operations and that, as the rent was a charge on every bit of the land demised, the entire rent should be suspended till the defendants are restored to possession of the lands from which they have been dispossessed.

It is common ground that, after the final publication of the record-of-rights, proceedings under section 105 of the Bengal Tenancy Act were started at the instance of the plaintiffs-landlords and the revenue officer settled the fair rent of the land in arrears at Rs. 18-5-9 pies, which was to be recovered from the beginning of the year 1326 B. S. On the record of this suit, the only part of the proceedings under section 105 which has been produced is the decree. The decree shows that the tenants-respondents were in possession of 21 *bighas* 5 *cottahs* and odd land and that the fair rent assessed on the same was Rs. 18-6-9 pies.

In Second Appeal, it has been contended on behalf of the appellants that the decree in the 105 proceedings has the force and effect of a decree of the Civil Court and it is not open to the respondents now to

contend that the holding in question originally consisted of 25 *bighas* and not 21 *bighas* as mentioned in the decree under section 105. Reference is made in this connection to the provision of section 107 of the Bengal Tenancy Act.

On behalf of the respondents, it has been contended that the decree in the 105 proceeding cannot bar the tenant from raising the contention of suspension of rent, as that was not a matter which was the subject matter of consideration in the 105 proceeding. It is said by the learned vakil for the respondents that the decree was an *ex parte* decree and the tenant-respondents did not raise the contention that they were entitled to suspension of rent by reason of dispossession by the plaintiffs from a part of the disputed holding.

It is consequently argued that the decree of the revenue officer cannot operate as a bar to the raising of the issue about suspension of rent. A number of cases have been cited on both sides, but none of them, except the one to which I shall presently refer, bear directly on the question at issue.

The true rule applicable in cases of this kind seems to have been laid down in the decision in the case of *Dharani Mohan Ray* v. *Asutosh Mukerji* (1). The facts of that case are briefly these:—The plaintiff instituted a suit for recovery of arrears of rent and relied on the fair and equitable rent fixed by consent in a 105 proceeding. The defendant alleged the holding was rent free. The circumstances under which the decree in the 105 case was passed are stated in the judgment as follows:—"It appears that the record-"of-rights in this case was finally published on the "16th December, 1912. The record contained an entry

(1) (1923) 40 C. L. J. 34.

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"to the effect that the defendants held the land without payment of rent, but that the land was liable to "be assessed with rent. The landlord thereupon "instituted a proceeding under section 105, Bengal "Tenancy Act, for assessment of fair rent. The "tenants contended that they held the land rent free. "Consequently the question contemplated by section "105A, clause (*a*), arose, namely, whether the land "was or was not liable to payment of rent. It, thereupon, became incumbent upon the revenue officer "to try and decide that issue and to settle rent under "section 105 if he should hold that the land was "liable to payment of rent. It is not clear what took "place before the Settlement Officer. But this much "becomes obvious, on an examination of the record-of-rights, that on the 15th November, 1913, rent was "assessed at the rate of Rs. 3-9 per annum. It has "been stated that this order was made by consent of "parties; but that is immaterial for our present "purpose, because under clause (*6*) of section 105, "where the parties agree amongst themselves, by "compromise or otherwise, as to the amount of the "fair rent, it is incumbent upon the revenue officer to "satisfy himself that the amount agreed upon is fair "and equitable, and it is only if he is so satisfied that "he can record the amount agreed upon as the fair "and equitable rent; if he is not so satisfied, he has "to settle a fair and equitable rent as provided in "sub-sections (*4*) and (*5*)." And the effect of the decision of the revenue officer was stated to be as follows:—"This much is incontrovertible that under "section 107, so long as that decree remains in force, "effect must be given to it, and, if effect is given to "it, there is no escape from the conclusion that the "claim for rent must be decreed on that basis".

It seems to me, therefore, that the decree under section 105 was conclusive between the parties in suit

on two questions: (*i*) the area of the holding, and (*ii*) the rent of the holding. So long as the decree stands, defendants are bound to pay the rent fixed by the settlement officer in respect of the holding of 21 *bighas* found in their possession by the settlement officer. The fact that the decree was an *ex parte* one does not take away from the effect of the decree. The defendants-respondents have to thank themselves if they did not choose to appear in the 105 proceedings and they must now take the consequences of the *ex parte* decree. The decree of the revenue officer operates as a final decree and is binding between the parties. Whatever the position of the parties may have been at the time when the tenancy was created, the effect of the revenue officer's decision is to define the present rights of the parties. In other words, the effect of the decision is to determine that the defendants are tenants of the plaintiffs-appellants in respect of 21 and odd *bighas* of land for which they are liable to pay Rs. 18-5-9 as fair and equitable rent.

There is no question that the defence of suspension of payment of rent would have been available to the tenants-respondents, for the rental, as far as can be gathered, was a lump rent. It has been so held in the case *Katyayani Debi* v. *Udoy Kumar Das* (1), where their Lordships of the Judicial Committee of the Privy Council observed as follows:—"The doc-"trine of suspension of payment of rent, where the "tenant has not been put in possession of the part of "the subject's lease, has been applied where the rent "was a lump rent for the whole land leased treated as "an indivisible subject. It has no application to "a case where the stipulated rent is so much per acre "or *bigha*". But as I have stated above this defence is barred by section 107 of the Bengal Tenancy Act

(1) (1924) I. L. R. 52 Calc. 417, 424; L. R. 52 I. A. 160 (166).

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by reason of the previous decree in the 105 case. It is to be noticed also that the tenants-respondents went on paying rents at the rate of Rs. 15-6-11 *gandas* for several years after the dispossession and, although this circumstance does not operate as an estoppel against the defendants, it shows on which side the justice of the case lies. It shows at any rate that the tenants-respondents were prepared to pay amicably in full the entire rent notwithstanding the dispossession.

In this view the appeal must be allowed. The decree of the lower Appellate Court is set aside and that of the first Court restored. In the circumstances of the case there will be no order as to costs.

RANKIN C. J. I entirely agree. I would add just a few words. It was strenuously contended before us that the question of the right of suspension of rent was not a matter before the settlement officer, who was concerned entirely with assessing a fair and equitable rent for the land, and it was contended that under section 105 and section 107 of the Bengal Tenancy Act, there was no estoppel or *res judicata upon the question* of the right of the tenant to a suspension of rent. That is quite true. But the doctrine of suspension of rent depends solely upon this that the rent due is an entire sum in respect of the land demised. If, therefore, the tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent and, unless he has a right or some equity to an apportionment, he can recover nothing on the contract. But the whole basis of the doctrine is that the rent due is one entire sum. In this case, the original tenancy is said to have been for 25 *bighas* 19½ *cottahs*. The land of which the tenant has had actual occupation is

21 *bighas* 5 *cottahs*. The decision of the settlement officer was that the fair rent for 21 *bighas* 5 *cottahs* was Rs. 18, this being an enhancement upon the rent of Rs. 15 for the original 25 *bighas*. If, therefore, this question depends upon any one proposition, that proposition is this: whether the tenant is able to-day, and, after the settlement officer's decision, to say, that he holds 25 *bighas* at an entire rent. It appears to me that unless we are to set aside the settlement officer's decision and give no effect to it at all, it must be held that in respect of the 21 *bighas* it has been found that the fair and equitable rent is Rs. 18; in other words, the entirety of the original rent is inconsistent with and has been destroyed by the finding of the settlement officer. I think, therefore, that the order proposed is a correct one.

S. M. *Appeal allowed*.

APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and Mitter J.

S. N. BANERJEE

v.

H. S. SUHRAWARDY.*

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July 14.

Practice—Procedure—High Court, Original Side—Ex parte decree, setting aside—Discretion of the High Court in the Original Side to restore suit decreed ex parte—Civil Procedure Code (Act V of 1908), O. IX, r. 13, how far it applies to the High Court, Original Side—Practice as to appearance of defendant, difference between High Court and mofussil Courts.

O. IX, r. 13 of the Code of Civil Procedure is directed in terms to a practice different from that which obtains on the Original Side of the High Court. It refers to the case which is the usual case in a mofussil Court, where a summons has gone to a defendant informing him that on a given

* Appeal from Original Civil No. 43 of 1927.