APPELLATE CIVIL.

Before Mukerji and N. K. Bose JJ.

HEMANTA KUMARI DEVI

v.

PRASANNA KUMAR DATTA.*

1928.

June 22.

Suit—Application under s. 105 of the Bengal Tenancy Act by co-sharer landlord—Withdrawal of application with permission to file suit—Exclusive allotment of holding to plaintiff on partition—Suit for enchancement of rent of entire holding under s. 30 whether barred by s. 109 of the Bengal Tenancy Act—Bengal Tenancy Act (VIII of 1885), ss. 30, 105, 109.

The plaintiff, a 14 annas' co-sharer landlord, applied under section 105, Bengal Tenancy Act, 1885, for settlement of fair and equitable rents of the holdings. The tenants' objection that such an application did not lie prevailed in two courts, but the High Court remanded the cases for a retrial upon consideration of certain special circumstances which might make such applications even by a co-sharer landlord maintainable. The plaintiff withdrew the applications with permission to bring fresh suits. Upon partition, the holdings were exclusively allotted to the plaintiff. In a suit under section 30 of the Act brought by her for enhancement of the rents it was—

Held that the subject-matter of the suits was not the same as that of the applications under section 105 within the meaning of the Full Bench decision in *Purna Chandra Chatterjee* v. *Narendra Nath Chowdhury* (1) and therefore the suits were not barred by section 109 of the Act.

Held, also, that, as the defendants in the proceedings under section 105 took up the position that the applications did not lie, they cannot now take up the position that the applications were entertainable and as such operate as bar to the suits. The doctrine that a litigant cannot be permitted to approbate and reprobate applies not only to successive stages of the same suit but also to another suit other than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

Dwijendra Narayan Roy v. *Joges Chandra De* (2) referred to.

SECOND APPEAL by the plaintiff, Rani Hemanta Kumari Devi.

The plaintiff had filed, when she was a joint 14 annas co-sharer landlord of the holdings in suit, five

*Appeals from Appellate Decrees, Nos. 546 and 550 of 1926, against the decrees of Aswini Kumar Das Gupta, Subordinate Judge of Mymensingh, dated Sep. 10, 1925, affirming the decrees of Satish Chandra Chakravarti, Munsif of Jamalpur, dated Jan. 16, 1925.

(1) (1925) I. L. R. 52 Calc. 894. (2) (1923) 39 C. L. J. 40.

applications for settlement of fair and equitable rents of the holdings. The tenants had then contended that such applications by a joint co-sharer landlord did not lie. In the first two courts the plaintiff's applications failed on this ground, but the High Court remanded the cases to the first court, observing that under certain special circumstances, notably if there were separate contracts between the parties, the applications might lie. The defendants (tenants) persisted in their opposition and the plaintiff who found that she was not in a position to prove those special circumstances withdrew the said applications with permission to bring civil suits. After that, on a partition with her co-sharers, the full 16 annas interest in the holdings was exclusively allotted to the plaintiff. Then she brought the present suits under section 30 of the Act for enchancement of the rents on the ground of rise of prices of staple food crops and increased productiveness of the soil.

Both the courts below have given effect to the defendants' preliminary objection that the suits were not maintainable inasmuch as the plaintiff had made applications for enhancement of rent on these grounds under section 105 and then withdrew from the same. Hence under section 109 of the Act the suits were not maintainable. The plaintiff thereupon appealed to the High Court.

Babu Brajalal Chakravarti (with him *Babu Debendranath Bagchi*), for the appellant in all the 5 appeals.

No one appeared for the respondents.

MUKERJI AND N. K. BOSE JJ. These 5 appeals arise out of as many suits that were instituted by the appellant for enhancement of rent under section 30 of the Bengal Tenancy Act. The courts below have dismissed the suits on the ground that they were not maintainable in view of section 109 of that Act.

The plaintiff had previously filed applications under section 105 of the Act. She was then a co-sharer landlord, her share amounting to 14 annas. She made her

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co-sharers *pro forma* opposite parties to her applications but prayed for enhancement of the rent due to her share. The defendants, who were the principal opposite parties in the proceedings, contested the maintainability of the application, and the trial court, as well as the court of first appeal, upheld the objection and ruled that the applications did not lie. She then preferred Second Appeals to this Court, which held that under certain conditions and circumstances the applications might lie—notably, if there were separate contracts between the parties. As the facts had not been investigated, the cases were remanded for further investigation. The defendants persisted in their opposition, and on that the plaintiff withdrew the applications, alleging that there were defects therein which were irremediable. Thereafter, on a partition with her co-sharers, the holdings were exclusively allotted to her share and she came to be the 16 annas landlord in respect thereof. She then instituted the present suits.

We are of opinion that, in the circumstances narrated above, the suits were not barred under the provisions of section 109 of the Act. There are at least two reasons which induce us to take this view.

Full Bench decision of this Court in the case of *Purna Chandra Chatterjee* v. *Narendra Nath Chowdhury* (1) has laid down that if an application is made under section 105 of the Bengal Tenancy Act and subsequently withdrawn, whether with or without the permission of the court, a suit on the same subject-matter is barred by the provisions of section 109 of the Act. The question, therefore, is whether the subject-matter in the present cases was the same. The holdings with which the application under section 105 were concerned consisted of the 14 annas undivided shares of the lands, while the holdings with which the present suits are concerned are the entire lands. The subject-matter, therefore, in our opinion was not the same.

(1) (1925) I. L. R. 52 Calc. 894.

Moreover, the effect of the previous litigation may not inaptly be put in this way: That the defendant's objection was given effect to by the two courts below, and the High Court having held that unless the plaintiff was able to prove certain facts the applications would not be maintainable, the plaintiff withdrew the applications because she would not be able to prove those facts. It is hardly consonant with justice that the defendants, who took up in the proceedings under section 105 the position that the applications did not lie, should be allowed to turn round and say that the said applications were entertainable in law, and as such operate as a bar to the suits. The present suits may rightly be said to have arisen out of the result of those applications. It is well settled that a party litigant cannot be permitted to asume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent; and that this wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit other than the one in which the position was taken up, provided the second suit grows out of the judgment in the first [*Dwijendra Narayan Roy* v. *Joges Chandra De*, (1)]. It is true that the applications were withdrawn but that withdrawal was after the defendant's objection had prevailed in the two courts below and would have prevailed for ever unless the plaintiff was in a position to get over it by establishing certain facts.

We are, accordingly, of opinion that the view taken by the courts below was erroneous. The appeal must succeed. The decisions of the courts below being set aside, the suits are sent back to the trial court to be dealt with on their merits. Costs of this Court as also of the courts below will be costs in the cause.

Appeal allowed.

R. K. C.

(1) (1923) 39 C. L. J. 40.