## CIVIL REVISION.

*Before Henderson and Khundkar JJ.*

GUNARBINNESSA CHAUDHURANI

*v.*

GOPENDRAPRASAD SHUKUL*.

1935

*May* 8, 13.

*Deposit—Deposit, when to be made—Bengal Tenancy Act (VIII of 1885), s. 174.*

The deposit which is required by proviso (*b*) to sub-section (*3*) of section 174 of the Bengal Tenancy Act is to be made when the application is allowed and not when it is filed.

*Mafijuddin Muhuri* v. *Mafijuddin* (1) and *Kuloda Prasad Majumdar* v. *Prativa Nath Roy* (2) followed.

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The material facts of the case and arguments in the Rule appear sufficiently from the judgment.

*Charuchandra Biswas* and *Jaygopal Ghosh* for the petitioner.

*Krishnakamal Maitra* for the opposite party.

*Cur. adv vult.*

HENDERSON J. The first point which arises for decision in this Rule is whether the deposit, which is required by proviso (*b*) to sub-section (*3*) of section 174 of the Bengal Tenancy Act, is to be made at the time the application is filed or before the application is allowed.

The petitioners filed an application and the learned Subordinate Judge directed them to deposit the amount recoverable under the decree within ten days. The petitioners then obtained this Rule. They are supported by the decision in the case of *Mafijuddin*

*Civil Revision, No. 125 of 1935, against the order of Santoshsheel Banerji, Subordinate Judge of Dinajpur, dated Jan. 16, 1935.

(1) (1933) I. L. R. 61 Calc. 338. (2) (1934) 60 C. L. J. 112.

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*Muhuri* v. *Mafijuddin* (1). On the other hand, the opposite parties rely on certain general arguments and certain observations made by Mukerji J. in the case of *Kuloda Prasad Majumdar* v. *Prativa Nath Roy* (2).

On behalf of the opposite parties it is contended that, inasmuch as the applicants cannot get any relief without making the deposit, it would be futile to provide that the deposit will not be required until some subsequent date: further if the intention of the legislature was to discourage false and frivolous applications, it is obvious that that object can only be obtained if the deposit is made at the time when the application is filed. So far as attaining this object is concerned Lort-Williams J. referred to this difficulty. Mukerji J. also in the other case said this:—

> The learned Judges have pointed out the enormous difficulties that are experienced in construing the clause. We are very doubtful if it was not the intention of the legislature that the word "allowed" in the clause should be read in the sense of "entertained," because we are unable to hold that unless it is so read the difficulties can be solved: the solution suggested in the aforesaid decision, in our opinion, is not a satisfactory solution of the difficulties.

On the other hand, the learned advocate, who supported this Rule, asked us to examine the matter from the point of view of an applicant who is unsuccessful. His contention is that, when the application may be dismissed on the merits, it would be unreasonable to call upon the applicant to deposit a sum of money which might have to be returned.

Finally the matter may be examined from the point of view of the destination of the money. No doubt if the section merely provided that a deposit is only to be made when the applicant is the judgment-debtor, it might be argued that it is quite reasonable to ensure that, whatever might be the result of the application, the admitted debt may be liquidated and a stop put to further proceedings in execution. The difficulty here is that the deposit is to be made whether the judgment-debtor is the applicant or not. We entirely agree

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with the opinion of Lort-Williams J. that it is impossible to decide what should be the proper destination of the deposit without taking into consideration the facts of each particular case.

We have, therefore, come to the conclusion that it is quite impossible to decide this important point by attempting to decide what was the intention of the legislature, and to what extent that intention has been carried out by the actual provisions of the section. In our opinion the only satisfactory way to decide the question is to consider the words which have been actually used. If that is done, there can, in our judgment, be no doubt that to admit an application is not the same thing as to allow it, and we accept the reasoning adopted by the learned Judges in the case of *Mafijuddin Muhuri* v. *Mafijuddin* (1). It cannot be said that this decision has been directly affected by the observations of Mukerji J. in the case of *Kuloda Prasad Majumdar* v. *Prativa Nath Roy* (2), because he was not expressly deciding the point, and did not go further than to enunciate a certain doubt. On the other hand, the view taken by Lort-Williams J. has also been taken in *Kunjalal Ghoshal* v. *Prabodhchandra Basu* by Mallik and Jack JJ. (3).

It is further contended on behalf of the opposite parties that this is a matter with which we cannot interfere under the provisions of section 115 of the Code of Civil Procedure, as the only point involved is one of a wrong decision on a point of law. It is clear that the learned Subordinate Judge has gone further than that. What he has really done is that under an erroneous construction of the section, he has refused to entertain and decide an application which the statute directs him to decide. Such a matter is clearly within the purview of section 115 of the Code.

Lastly it was contended that we ought not to interfere because the petitioners have another remedy

(1) (1933) I. L. R. 61 Calc. 338. (2) (1934) 60 C. L. J. 112.
(3) (1934) Civil Revision, No. 1215 of 1933, decided on 16th Jan.

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by way of appeal. Certainly if the learned Subordinate Judge had dismissed the application the petitioners could have filed an appeal, and, if they did not do so, we might refuse to give them any relief in revision. But in the present case we do not even know that the learned Subordinate Judge will dismiss the application. He may keep it pending indefinitely. Further more when once the Rule has been issued, no useful purpose would be served by discharging it and leaving the parties to get the same point decided in appeal.

For these reasons we make the Rule absolute, and direct the Subordinate Judge to determine the petitioners' application in accordance with law. Costs of this Rule will abide the result. We assess the hearing fee at two gold mohurs.

KHUNDKAR J. I agree.

*Rule absolute.*

A.C.R.C.