

APPELLATE CIVIL.

Before Nasim Ali and Henderson J.J.

CHARU SHEELA DASEE

v.

ABHI LASH BAURI.*

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Jan. 22, 23;
Mar. 11;
April 24.

Appeal—*Appeal against decision of revenue officer—Dismissal of appeal by Special Judge on ground of inadequate stamp—Court-fees—Valuation of appeals—Court-fees Act (VII of 1870), s. 7 ii; Sch. I, Art. I—Bengal Tenancy Act (Act VIII of 1885, as amended by Beng. Act I of 1907), ss. 105, 105A, 106, 109A(3).*

No appeal lies to the High Court against an order of the Special Judge dismissing an appeal arising out of s. 105 of the Bengal Tenancy Act on the ground that the Court-fees paid were inadequate.

Jnanadasundari Shaha v. Madhabchandra Mala (1) relied on.

For the purposes of appeal to the Special Judge against the decision of the revenue officer, determining questions specified in s. 105A of the Bengal Tenancy Act, memoranda of appeals within the meaning of Art. 1, Sch. I, of the Court-fees Act are required and the Court-fees payable on such memoranda are *ad valorem* on the value of the subject matter in dispute in appeal, subject to a maximum of Rs. 20.

Upadhya Thakur v. Persidh Sing (2) not applied.

Such appeals should be valued on the principle of the valuation of memoranda of appeals in suits, under s. 7 ii of the Court-fees Act.

Charusheela Dasee v. Mozaftar Shaikh (3) relied on.

SECOND APPEALS by the plaintiff, landlord.

The facts of the case and arguments advanced in the appeals appear sufficiently from the judgment.

Atul Chandra Gupta and Bhola Nath Ray for the appellant.

*Appeals from Appellate Decrees, Nos. 1069, 1070 and 1071 of 1932, against the decrees of A. C. Ganguli, Special Judge of Birbhum, dated July 29, 1931, affirming the decrees of P. Banerji, Assistant Settlement Officer, Rampurhat, dated Aug. 31, 1929.

(1) (1931) I. L. R. 59 Cal. 388. (2) (1896) I. L. R. 23 Cal. 723.
(3) (1931) I. L. R. 59 Cal. 997.

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Pancha Nan Ghosh and *Mukti Pada Chatterji* (in No. 1070), *Nirod Bandhu Ray* (in Nos. 1069 to 1071), *Subodh Chandra Datta* (in Nos. 1070 and 1071) and *Ramendra Chandra Ray* for the Deputy Registrar in Nos. 1070 and 1071 for respondents.

Sarat Chandra Basak for the Secretary of State.

Cur. adv. vult.

NASIM ALI J. The appellant in these three appeals filed three applications under s. 105 of the Bengal Tenancy Act before the revenue officer of Rampurhat, in the district of Birbhum, for settlement of fair and equitable rent of certain holdings. Before the revenue officer, she raised the following issues under s. 105A :—

(1) Are the holdings in dispute, though recorded as *mokarrari* in the record-of-rights, occupancy holdings ?

(2) Are the rents recorded in the record-of-rights the existing rent of the holdings ?

(3) Is she entitled to get additional rent for excess area ?

She paid Court-fee of 12 annas for each of the holdings mentioned in her application and Rs. 20 for each of three applications.

The revenue officer decided against her. She filed three appeals before the Special Judge of Birbhum and paid the same Court-fee on her memoranda of appeals as she did on her applications before the revenue officer. The learned Judge treated the appeals as appeals arising out of suits under s. 106 of the Bengal Tenancy Act and demanded additional Court-fees. The appellant having failed to comply with the order of the Judge her appeals have been dismissed. She appeals to this Court. In her memoranda of appeals to this Court she has paid the same Court-fees as before the Special Judge.

During the pendency of the appeals to this Court the respondent No. 9 in S.A. No. 1069, respondents Nos. 17, 18, 45, 48, 72 and 73 in S.A. No. 1070,

respondents Nos. 10, 13, 24, 41, 44, 59, 62, 66 and 94 in S.A. No. 1071 died. Their heirs were not substituted within the time prescribed by law. The appellant's claim for fair rent in respect of the following *khatiyâns* is, therefore, dismissed:—

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Appeal No.	Khatiyân No.
S. A. No. 1069 of 1932	114
S. A. No. 1070 of 1932	15
	18
	66
	133
S. A. No. 1071 of 1932	23
	31
	35
	39
	71
	191
	202

A preliminary objection has been taken to the hearing of these appeals on behalf of the respondents on the ground that the order of the learned Special Judge, though in form an order of dismissal, is in substance an order of rejection of memoranda of appeals and no appeal lies against such an order. In order to determine whether an order dismisses an appeal or simply rejects it, the substance and not the form of the order is to be considered. The order of the Special Judge is not accurately expressed, because it states that the appeals are dismissed and not that the memoranda of appeals are rejected. It is, however, clear that the intention of the Judge was to reject the memoranda as they were not properly stamped. The learned advocate for the appellant, however, contends that an appeal lies against an order rejecting a memorandum. Now, an appeal to this Court against the decision of the Special Judge lies under s. 109A (now s. 115C), cl. (3) of the Bengal Tenancy Act. The clause lays down that such an appeal is subject to the provisions of O. XLII of the Code of Civil Procedure. Order XLII of the Code lays down that the rules of O. XLI shall apply so far as may be to appeals from appellate decrees. The order appealed against does not come under r. 3 of O. XLI which provides for

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rejection of memorandum of appeal. But by s. 107, cl. (2) of the Code the appellate Court has the same powers as the Court of original jurisdiction in respect of suits instituted therein. By r. 11 of O. VII of the Code, the trial Court has been empowered to reject a plaint if the plaint is not properly stamped and the plaintiff being required to supply the requisite stamps fails to do so. The Special Judge, therefore, had power to reject the memorandum of appeal for failure of the appellant to supply the requisite stamps. The question then is whether the order is appealable. In the case of *Inanadasundari Shaha v. Madhab-chandra Mala* (1), Suhrawardy J. observed :—

Section 107 (2) invests an appellate Court with the same powers as are conferred on a Court of original jurisdiction. It does not purport to give the order passed by an appellate Court the same effect as an order passed by an original Court of a like nature. Section 2 expressly says that "decree" shall be deemed to include the rejection of a plaint. If it was the intention of the legislature to include within the definition of "decree" an order rejecting a memorandum of appeal, it would have expressly said so.

With these observations I respectfully agree. Section 109A(3) of the Bengal Tenancy Act makes the provision of O. XLII applicable to the appeals to this Court. By implication the provisions of O. XLI are attracted. Even if the provisions of O. XLIII also are attracted, an order rejecting a memorandum of appeal is not appealable under its provisions. As at present advised, I am inclined to think that an appeal arising out of a proceeding under s. 105 against the decision of the Special Judge lies to this Court when there has been an investigation and determination by him of any of the questions under s. 105A.

I am, therefore, of opinion that no appeal lies to this Court against the order of the Special Judge. But in view of the facts and circumstances of these cases we treat the memoranda of appeals to this Court, so far as they relate to the tenancies in respect of which the appeals have not abated, as petitions for revision under s. 115 of the Code of Civil Procedure.

(1) (1931) I. L. R. 59 Cal. 388, 390-1.

The point for determination in these cases is what was the Court-fee payable on memoranda of appeals before the Special Judge in respect of the *khatiyāns* other than those in respect of which the claim for additional rent has been dismissed by us.

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It was not disputed at the bar that the amount of Court-fee payable for the petitions before the revenue officer is governed by the notification under s. 105(3) of the Bengal Tenancy Act. It is, however, argued by the learned advocate for the appellant that the notification does not apply to appeals and that for determining the Court-fee payable we must look to the Court-fees Act. It is also argued that the memoranda of appeals before the Special Judge do not come under Art. 1 of Sch. I of the Court-fees Act and that they come under Art. 1. cl. (b) of Sch. II of the same Act. In support of this contention the learned advocate relied upon a Full Bench decision of this Court, *Upadhya Thakur v. Persidh Sing* (1). This ruling is of the year 1896. In that case, it was held that no memorandum of appeal was required before the Special Judge in an appeal arising out of a proceeding for settlement of rent under s. 104(2) of Chap. X of the Bengal Tenancy Act of 1885, as it stood then, inasmuch as the proceeding under that section was not a suit. The reasons given for this decision are these:—

(1) The proceeding was instituted by an application and not by a plaint.

(2) The application was not subject to an *ad valorem* Court-fee.

(3) The provisions of s. 107 (old Act) did not prescribe that the decision of the revenue officer in such proceeding would be a decree. It had the force of a decree which it might have without the proceeding necessarily becoming suit.

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(4) None of the rules framed by the Local Government under s. 189(1) of the Act laid down that such a proceeding would be a suit.

(5) The rule framed by the Government to the effect that such a proceeding should be dealt with as a suit in respect of its procedure did not make them suits for purposes of Court-fees, as s. 189 of the Act did not authorise the Government to make rules about Court-fees.

Chapter X of the Bengal Tenancy Act of 1885 has been greatly modified from time to time after the Full Bench decision by amending Acts.

Government have now obtained power from the legislature to fix Court-fees for proceedings for settlement of fair and equitable rent. See s. 105(3). Section 105A has been introduced. Mookerjee J., while stating the history of the introduction of this section in the case of *Jnanada Sundari Chowdhurani v. Amudi Sarkar* (1), decided by a Full Bench of this Court, observed as follows in the year 1916 :—

Section 105 did not by itself, in its original form, contemplate an investigation into the question of the correctness of entries in the record-of-rights, yet a practice had grown up in proceedings under that section to decide questions which the legislature contemplated should be determined by a suit under s. 106. To put the matter in another way, the parties were placed in the same position as if a suit under s. 106 and a proceeding under s. 105 had been simultaneously instituted and consolidated, and an amalgamated trial held for the investigation of the question of fair and equitable rent. This led to the enactment of s. 105A, which regularises the practice that gradually developed; and the revenue-officers, while seized of proceedings under s. 105, were expressly authorised to determine questions mentioned in s. 105A which, in ordinary course, would form the subject of an enquiry under s. 106. * * * * * It follows accordingly that if in any proceeding under s. 105, questions under s. 105A have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of questions within the scope of s. 105A and consequently of s. 106. * * * We cannot be invited to sacrifice substance to form, to look merely at the label and not the contents of the adjudication.

Before the introduction of s. 105A, by the amending Act of 1907, by a notification of the year 1899, a

(1) (1916) I. L. R. 43 Cal. 603, 618-9.

Court-fee stamp of 8 annas was payable on applications under s. 105 which replaced s. 104(2) of the old Act in the year 1898.

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By the notifications of the years 1918 and 1922, under s. 105(3) of the Bengal Tenancy Act. Court-fees payable were fixed thus:—

(a) A stamp of 12 annas for each tenancy which is the subject matter of an application under s. 105.

(b) An *ad valorem* fee chargeable under Art. 1 of Sch. I of the Court-fees Act subject to a maximum of Rs. 20 in addition to the stamp of 12 annas for adjudication of issues mentioned in s. 105A.

By the notification under s. 35 of the Court-fees Act, the Court-fee payable for a suit under s. 106 is exactly the same as for trial of issues specified in s. 105A in a proceeding under s. 105. This has been made clear by the introduction of s. 105B in Chap. X of the Bengal Tenancy Act. Section 107 of the Act as it stood before its amendment in 1898 laid down that the decision in a proceeding for settlement of rent should have the force of a decree. The decision under ss. 105 and 105A have now the force and effect of a decree of a civil Court in a suit between the parties. By r. 60(9) and (10) of Government rules framed under the Act, the entry made in the decision of the revenue officer and schedule attached thereto with regard to the fair rent settled shall be held to be a decree and a proceeding under s. 105A shall be considered as a part of the proceedings under s. 105.

Before 1898, there was no provision in Chap. X corresponding to s. 109, which was introduced by the amending Act of 1898. After the introduction of s. 105A, proceedings under ss. 105 and 105A are now under the operation of s. 109.

Under s. 108(3) of the Act, as it stood before 1898, though there was a Second Appeal to this Court from

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the decision of a Special Judge in a suit under s. 106, there was no Second Appeal to this Court from the decision of the Special Judge in a proceeding under s. 104(2). Section 109A (now s. 115C after amendment in 1928) which has replaced the old s. 108 gives a right of Second Appeal if the decision of the Special Judge is not a decision simply settling rent but a decision determining questions within the scope of s. 105A and consequently of s. 106.

By successive legislation and notification after the Full Bench decision in *Upadhya Thakur's* case (1), the character of a proceeding under s. 105 in which questions mentioned in s. 105A are investigated and determined has now been changed. The decision on questions specified in s. 105A is for all practical purposes a decision under s. 106. The ruling in *Upadhya Thakur's* case (1), therefore, cannot in my opinion apply to appeals before the Special Judge against the decision of the revenue officer determining the questions specified in s. 105A. For such appeals, memoranda of appeals within the meaning of Art. 1, Sch. I of the Court-fees Act are required and the Court-fees payable on such memoranda are *ad valorem* on the value of the subject matter of dispute in appeal subject to a maximum of Rs. 20.

The next question is what is the value of the subject matter of dispute in the appeals before the Special Judge. In determining the value under Art. 1, Sch. I, we have got to look to the principles laid down in the sections of the Act. In view of the decision of the Court to which the appellant was a party, *i.e.*, *Charusheela Dasee v. Mozaffar Shaikh* (2), the principle laid down for determining the value of memoranda of appeals in suits under s. 7ii of the Court-fees Act should be adopted in valuing the appeals before the Special Judge in these cases. The appellant is, therefore, liable to pay a Court-fee of

(1) (1896) I. L. R. 23 Cal. 723.

(2) (1931) I. L. R. 59 Cal. 997.

12 annas *plus ad valorem* fee on ten times the difference between fair rent claimed before the revenue officer and the rent recorded in the record-of-rights, subject to a maximum of Rs. 20 for each of the *khatiyâns*.

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We, therefore, direct the Stamp Reporter to report what would be the additional Court-fee, which was payable in the Court of the revenue officer and the Special Judge in accordance with our decision in the cases for the *khatiyâns* other than those in respect of which the claim has been dismissed by us.

The Stamp Reporter is also directed to report what amount of additional Court-fee would be payable on the memoranda of appeals treated as petitions for revisions under s. 115 of the Code of Civil Procedure.

Further orders in these cases will be made as soon as the report of the Stamp Reporter is submitted.

HENDERSON J. I agree.

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S. M.