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real state and that the conveyance of the 24th of April, 1923, was fictitious and without consideration. I agree that he has failed to discharge the onus, and that the suit should be decreed with costs.

Appeal decreed.

APPELLATE CIVIL.

Before Terrell, C. J., and Mullick, J.

RAM NARAYAN SINGH

v.

SUKHDEO TELI.*

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April, 18.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 106 *and* 109—*suit for correction of record-of-rights—suit withdrawn—subsequent suit against the plaintiff—defence that entry is wrong.*

Section 109 of the Bengal Tenancy Act, 1885, does not debar a defendant from taking as a defence grounds which were the subject-matter of an application which was made by him before the Settlement Officer in a proceeding under section 106, but on which no decision having the force of a decree was made by the Settlement Officer.

Where, therefore, a suit under section 106 by the purchaser of a holding, for substitution of his name in the record-of-rights in place of that of the vendor, is withdrawn without leave to institute a fresh suit, the purchaser is not debarred by section 109, in a suit for declaration of title and possession by the reversioners of the vendor from pleading that the holding is his by purchase.

Purna Chandra Chatterjee v. *Narendra Nath Chowdhury*(1), distinguished.

Aswini Kumar Aich v. *Saroda Charan Basu* (2), approved.

* *Second Appeal no. 1116 of 1925, from a decision of Babu Pramatha Nath, Subordinate Judge of Saran, dated the 8th June, 1925, reversing a decision of Babu Charu Chandra Coari, Munsif of Chapra, dated the 5th March 1924.*

(1) (1925) I. L. R. 52 Cal. 804, F. B. (2) (1916) 24 Cal. L. J. 79.

Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Mullick, J.

Harnandan Prasad, for the appellants.

Ram Prasad, for the respondents.

MULLICK, J.—This is an appeal against a decision of the Subordinate Judge of Chapra dismissing the plaintiffs' suit. The plaintiffs sued for a declaration of title and recovery of possession of certain land from the defendant no. 1 alleging that they were the reversioners of one Padarath. The defendant's main defence was that long before the succession opened he had purchased the land from Padarath for value. The findings of fact are all in the defendant's favour and the only question of law which arises in this second appeal is whether by reason of the provisions of section 109 of the Bengal Tenancy Act the defendant is precluded from taking his present defence.

The argument as to the application of section 109 is put in this way:—It appears that on the 7th May, 1920, the defendant made an application to the revenue officer purporting to be one under section 106 of the Bengal Tenancy Act which relates to a dispute as to the entry in the record-of-rights. That entry shewed the recorded tenant to be still in possession, namely, Padarath, and the defendant's application was that the name of Padarath should be removed and his name should be entered as the tenant in possession. The defendant did not prosecute that application and withdrew it without leave to institute a fresh application. It is now contended that section 109 of the Bengal Tenancy Act debars the defendant from taking as a ground of defence the plea that he is the purchaser of the property and reliance for this purpose is placed on the decision of the Full Bench of

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the Calcutta High Court in the case of *Purna Chandra Chatterjee* v. *Narendra Nath Chowdhury* (1). With regard to this decision of the Full Bench it is quite clear that it is not upon the same subject-matter. That decision related to an application under section 105 of the Bengal Tenancy Act. An application had been made for the settlement of fair rent before the settlement officer and had been withdrawn with leave to make a fresh application. A suit was subsequently brought in the Civil Court for enhancement of rent and it was held by the majority of the Full Bench that the subject-matter of the Civil Suit and the subject-matter of the application under section 105 being identical no civil suit would lie by reason of the provisions of section 109. In the present case the application of the 7th May, 1920, made by the defendant was an application under section 106 and I fail to see how the subject-matter of that application can be identical with the subject-matter of the present suit. That application related to a dispute regarding the correctness of the entry. The present suit is for a declaration of title and recovery of possession. In reality it is a suit for recovery of possession in which the declaration is merely incidental. I cannot see how the present suit is concerned with any matter which has already been the subject of the prior application. If the application under section 106 had proceeded to trial, and there had been a decision declaring that the plaintiff was entitled to be entered as the raiyat, something might have been said for the view that another suit would not lie by the same plaintiff. But even in that case it is for consideration whether this Court would go so far as to accept the reasoning of the majority of the Full Bench in the decision cited above in its entirety. But we are not concerned with the correctness of the Full Bench decision because, as I have said, the subject-matter of the present suit is altogether different. In my opinion, therefore, section 109 would not have been a bar to a suit for

(1) (1925) I. L. R. 52 Cal. 394.

declaration of title and recovery of possession by the defendant no. 1 and in this view I am supported by the decision of a Division Bench of the Calcutta High Court in the case of *Aswini Kumar Aich* v. *Saroda Charan Basu* (1). This decision does not appear to have been noticed by their Lordships of the Calcutta High Court in their judgment in the Full Bench case.

There is, however, another ground upon which the defendant ought to succeed. Section 109 debars a person who has made an application under section 106 from bringing a suit in regard to the same subject-matter in a Civil Court. But the section nowhere says that a defendant cannot take as a defence grounds which were the subject-matter of an application which was made by him before the settlement officer in a proceeding under section 106, but on which no decision having the force of a decree was made by the settlement officer. The bar is placed upon a plaintiff who has already been an applicant before the settlement officer but there is no disqualification of any kind put by the section upon a defendant who has been an applicant before the settlement officer. There may be circumstances when section 107 and the principle of res judicata may operate but that is a different matter.

On these two grounds the decision of the learned Subordinate Judge must be affirmed and the appeal must be dismissed with costs.

COURTNEY TERRELL, C. J.—I agree and only add this observation. As my learned brother Mullick has pointed out the Full Bench case is no authority in this matter inasmuch as that dealt with an application under section 105 where the subject-matter of the application and the subsequent suit were the same, whereas in this case the application is under section 106 and the suit and the application deal with different subject-matters. But I think that the reasoning of the majority of the Court in the Full

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Bench case went on a wider basis still and, upon the ground stated by Walmsley, J., was based upon the strict interpretation of the words of the section that once an application had been made under any of those sections the matter could never be the subject of a suit again in the Civil Court. In my view the reasoning of the majority of the Calcutta High Court is difficult to understand and I prefer the reasoning given by Suhrawardy, J., in his minority judgment.

Appeal dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

FAKHRUL ISLAM

v.

RANI BHUBANESHWARI KUER.*

1928.

May, 4.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 22—*Notice issued but not served—sale set aside—fresh sale proclamation issued and property sold—whether fresh notice under rule* 22 *necessary.*

Ordinarily a sale without service of notice under Order XXI, rule 22, is without jurisdiction, but where a notice has in fact been issued and the judgment-debtor, though not served with the notice, has appeared and contested the execution, the object of rule 22 has been achieved and the court has jurisdiction to hold the sale.

An execution sale having been set aside on the application of the judgment-debtor on the ground that a notice issued under Order XXI, rule 22, had not been served, the court directed the decree-holder to take further steps in execution and, accordingly, a fresh sale proclamation was issued, and the property was sold. On an application to set aside the sale on the ground that a fresh notice under rule 22 should have been issued, *held*, that a fresh notice under rule 22 was not necessary.

*Appeal from Appellate Order nos. 276 to 280 of 1927, from an order of Rai Bahadur A. N. Mitter, Officiating District Judge of Gaya, dated the 31st August, 1927, reversing an order of Maulavi Amir Hamza, Subordinate Judge of Gaya, dated the 14th May, 1927.