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## APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Gupta.

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KURBAN ALI AND ANOTHER (*Plaintiffs*) v. JAFAR ALI  
AND OTHERS (*Defendants.*)\* [22nd May, 1901.]*Res judicata*—*Bengal Tenancy Act (VIII of 1885)*, s. 105 (103-A), s. 106—*Distinction between order under s. 105 (103-A), and s. 106.*

When a Revenue Officer disposes of an objection summarily under s. 105 (103-A of the amended Act) of the Bengal Tenancy Act (VIII of 1885) without adopting the procedure laid down in the Code of Civil Procedure for [472] the trial of suits his order will not be open to appeal or second appeal, nor will it have the effect of *res judicata*.

*Dengu Kazi v. Nobin Kissori Chowdhrahi*, (1) discussed and explained.

In December 1896 an objection was raised by the plaintiffs (tenants) as to the rent which should be entered as payable by the plaintiffs in the Record of Rights, and by an order, dated the 19th December 1896, made under s. 105 (s. 103-A of the Act as amended) of the Bengal Tenancy Act, the Revenue Officer decided in favour of the landlords (defendants). Again in 1897 after the final publication of the Record of Rights the plaintiffs applied asking that their rent should be entered as Rs. 13-6-6 instead of Rs. 29-4-6, which was the amount entered under the previous order. The Revenue Officer decided the case under s. 106 of the Bengal Tenancy Act allowing the claim of the tenants. The defendants (landlords) appealed to the District Judge, who held on the authority of the case of *Dengu Kazi v. Nobin Kissori Chowdhrahi* (1) that the matter was *res judicata* and dismissed the application with costs. The tenants (plaintiffs) appealed against that decision to the High Court contending that the matter was not *res judicata*, as the previous decision of the Revenue Officer was passed in a case under s. 105; the matter was not "heard" and "decided," and the decision, therefore, had not the force of a decree and was no bar to the present application.

Babu Joy Gopal Ghose, on behalf of the appellants.

Babu Nalini Ranjan Chatterji, on behalf of the respondents.

1901, MAY 22. The judgment of the High Court (RAMPINI and GUPTA, JJ.) is as follows:—

This is an appeal against a decision of the District Judge of Mozafferpur in a settlement proceeding.

The Settlement Officer had, upon the application of certain raiyats, held that their rents should be entered as Rs. 13-6-6 instead of Rs. 29-4-6, as alleged by their landlord. On appeal to [473] the District Judge he held on the authority of the case of *Dengu Kazi v. Nobin Kissori Chowdhrahi* (1) that the matter was *res judicata*, as there had previously been a dispute between the parties in the course of which, *viz.*, on the 16th December 1896, the rent had been found to be as alleged by the landlords (the respondents before us).

The raiyat appellants now urge that the matter is not *res judicata* as the previous decision of the Settlement Officer was passed in a case

\* Appeal from Appellate Decree No. 1000 of 1899, against the decree of A. E. Staley, Esq., District Judge of Tirhoot, dated the 22nd of February 1899, reversing the decree of Babu Charu Chunder Kumar, Assistant Settlement Officer of Mozafferpur, dated the 4th of November 1898.

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under s. 105, and was not passed between the same parties as the parties to the present suit.

It is not clear from the previous order itself whether it was passed in a case under s. 105, or one under s. 106. The Judge, however, describes it as having been passed in a case under s. 105, but on the authority of *Dengu Kazi v. Nobin Kissori Chowdhurani* (1) seems to think it must be regarded as having been passed in a case under s. 106 and so, having the force of a decree, must bar the present suit. There is no doubt much in the order of reference and in the judgments in *Dengu Kazi's* case, which favours this view, for in that case it has been held that when a dispute arises about an entry in the Record of Rights, whether during the pendency of the publication of the draft record, or even before the making of any particular entry in it, and when such a dispute is decided by the Settlement Officer his decision is to be regarded as one in a case under s. 106, from which a second appeal lies under s. 108, sub-section 3.

But it must be considered in the first place what the two ss. 105 and 106 mean, and in the next place, what the case of *Dengu Kazi* has decided.

Clearly, we think section 105 means to lay down that, during the pendency of the draft publication, any person affected by an entry in the record may raise an objection with regard to it, which the Revenue Officer is to "receive" and "consider," and dispose of in a summary manner. From an order disposing of such an "objection" there would seem to be no appeal for the Revenue Officer's order is not a "decision" within the meaning [474] of s. 108, sub-section (2), and no second appeal, and the order cannot have the effect of *res judicata*.

On the other hand a "dispute" under s. 106 is to be "heard" and "decided" by the Revenue Officer under the "procedure laid down in the Code of Civil Procedure for the trial of suits" (Section 107), and is subject to appeal [s. 108, sub-section (2)], and second appeal [s. 108, sub-section (3)]. Such appears to have been the intention of the legislature. The question then is, "How far has the Full Bench decision in *Dengu Kazi's* case altered this?" In this case, a dispute had arisen between landlord and tenant in certain settlement proceedings, which was decided by the Settlement Officer, in what he described as a case under s. 106. When this case came in second appeal before this Court it was objected that there was no second appeal, as when the case was decided, no record of rights had been completed or published, and so on the authority of the cases of *Gopi Nath Masat v. Adoito Naik* (2) and *Anand Lall Paria v. Shib Chunder Mukherjee* (3) it was contended the case had been decided not under s. 106, but under s. 105. Now the decision in *Dengu Kazi's* case, as we understand it, lays down that a "dispute" may arise at any time, both before and after the publication of the draft record and even before the record is made, and that, whenever a dispute arises in this way, and is decided under s. 106, it is open to second appeal. The Full Bench does not seem to us to mean to lay down that when an "objection" is made under s. 105 and is "received" and "considered" by the Revenue Officer, *i.e.*, summarily without following "the procedure laid down in the Code of Civil Procedure for the trial of suits," his order

(1) (1897) I. L. R. 24 Cal. 462.  
(2) (1894) I. L. R. 21 Cal. 776.

(3) (1895) I. L. R. 29 Cal. 477.

disposing of it will be open to either appeal or second appeal, or will have the effect of *res judicata*.

In the present suit, the previous order of the Revenue Officer is described by the Judge as one under s. 105, and we have examined it and it appears to us to be an order under s. 105; for the Revenue Officer in disposing of it does not seem to have adopted [475] "the procedure laid down in the Code of Civil Procedure for the trial of suits." Hence we do not think it can have the effect of *res judicata*.

The appellants' objection that the previous order is not between the same parties, as the present suit is founded on the fact that in the previous order the name of the landlord is recorded as Sultan Ali, while in the present suit the names of the landlords are Kurban Ali and Sultan Ali, that is to say, there is an additional landlord in the present suit. It may be, however, that Kurban Ali was a party to the case under s. 105, though his name does not appear in the form in which the Revenue Officer has recorded his order. We could not decide this question without having the whole record of the s. 105 case before us. We, therefore, do not rest our decision on this ground.

For these reasons we consider that the Judge is wrong in holding that the present suit is barred by *res judicata*.

We accordingly set aside his decree, and remand the case to him to be disposed of on the merits. Costs to abide the result.

*Case remanded.*

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PRIVY COUNCIL.

PRESENT :

*Lord Hobhouse, Lord Macnaghten, Lord Robertson, Sir Richard Couch and Sir Ford North.*

RADHA RAMAN SHAHA AND OTHERS (*Defendants*) v. PRAN NATH ROY AND OTHERS (*Plaintiffs*). [2nd May, 1901.]

[*On appeal from the High Court of Judicature at Fort William in Bengal.*]

*Suit, right of—Decree ex parte—Execution sale—Fraud—Civil Procedure Code: (Act X of 1882), s. 108—Effect of order rejecting previous application to set aside the decree, where the plaintiff had not appealed from such order.*

The defendants sued the plaintiff for arrears of rent, and obtained an *ex parte* decree, in execution of which they attached and sold land of the [476] plaintiff. The plaintiff applied under s. 108 of the Civil Procedure Code to set aside the decree. His application was rejected, but he did not appeal from this order.

The plaintiff then sued to set aside the decree and the sale in execution on the ground that he had no interest in the land, in respect of which the arrears of rent were alleged to be due, and the decree and sale had been obtained by false returns of summons and of processes in execution, and were fraudulent and void. The defendant objected that the plaintiff, having applied under s. 108 without success and not having appealed from the order rejecting his application, had no right of suit in the Civil Court.

*Held, that the suit was maintainable.*

APPEAL from a judgment and decree of the High Court of Calcutta (2nd April 1897), reversing a decree of the Subordinate Judge of Pubna (9th September 1895).

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