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no power, on the authority of *Kali Kinkar Sett v. Dinobandhu Nandy* (1), to revoke the sanction or to extend the time. That being my opinion, the present Rule must fail and must be discharged with costs.

Rule discharged.

Attorneys for the plaintiffs: *Leslie & Hinds.*

Attorney for the defendant, Brojendranath Saha
P. N. Sen.

H. R. P.

(1) (1905) I. L. R. 32 Cal. 379.

APPELLATE CIVIL.

Before Chitty and Teunon JJ.

CHEODDITTI

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Dec. 9.

Suit—Bengal Tenancy Act (VIII) of 1885, ss. 30(b) 37, 105, 107, 109—Whether an application under s. 105 of the Act, a suit—Withdrawal of an application under that section, effect of—Subsequent suit for enhancement of rent under s. 30(b), whether maintainable.

An application under section 105 of the Bengal Tenancy Act cannot be regarded as a suit.

Upadhya Thakur v. Persidh Singh (1) referred to.

Therefore, although an application under section 105 of the Bengal Tenancy Act was previously withdrawn, without liberty to make a fresh application, a subsequent suit for enhancement of rent under s. 30(b) of the Act is maintainable; the provisions of either section 37 or 109 of the Act are not applicable to such a case.

* Appeal from Appellate Decree, No. 2993 of 1910, against the decree of J. C. Twidell, District Judge of Bhagalpore, dated July 5, 1910, confirming the decree of Paresch Chandra Banerjee, Munsif of Bhagalpore, dated March 19, 1910.

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

SECOND APPEAL by A. B. Cheodditti, the plaintiff.

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This appeal arose out of an action brought by the plaintiff to recover arrears of rent, in which he also claimed enhancement of rent under section 30(b) of the Bengal Tenancy Act. It appeared that the plaintiff previously made an application under s. 105 of the Act for settlement of fair and equitable rent of the defendants. The said application was withdrawn by him, the plaintiff, but no leave was granted to make a fresh application. An appeal was preferred by him to the Special Judge against the order refusing to grant leave, but it was dismissed on the 3rd April, 1907. The present suit was contested by the defendant mainly on the ground that, regard being had to the provisions of sections 37 and 109 of the Bengal Tenancy Act, the claim for enhancement was not maintainable. The Court of first instance gave effect to the contention of the defendants, and disallowed the claim for enhancement, but passed a modified decree in favour of the plaintiff at the admitted rate. On appeal, the decision of the first Court was affirmed by the learned District Judge. Against that decision the plaintiff appealed to the High Court.

Babu Umakali Mukherjee (with him *Babu Kulwant Sahay*), for the appellant. Section 105 of the Bengal Tenancy Act relates to application only. Such an application is optional. A landlord may either apply under that section to get the rent of the tenant settled, or sue under section 30(b) of the Act for enhancement of the rent. An application under section 105 cannot be regarded as a suit: see *Upadhyaya Thakur v. Persidh Singh* (1). Therefore, on withdrawal of an application under that section, without any leave to prefer a fresh application, does not bar a

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

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subsequent suit for enhancement of rent under section 30(b). Section 373 of the Code of Civil Procedure relates to withdrawal of suits and not of applications. Moreover, the subject-matter of the subsequent suit is different from the subject-matter of the previous application. The application under section 105 having been withdrawn, it could not be said that it had the force of a decree under section 107, nor could it be said that there was a suit which was dismissed on the merits. That being so, the suit was maintainable, and the provisions of sections 37 and 109 of the Bengal Tenancy Act had no application.

Babu Mohini Mohan Chatterjee, for the respondent. Section 373 of the Code of Civil Procedure applies to the facts of the present case. Section 107 of the Bengal Tenancy Act makes it clear that the procedure to be adopted by the Revenue officer in all proceedings for the settlement of rent is the same as laid down in the Civil Procedure Code for trial of suits, and the order passed in such proceeding has the force and effect of a decree. Section 373 appears in Part II of the Code, which treats of incidental proceedings in suits; therefore, under section 107 of the Bengal Tenancy Act, section 373 of the Code of Civil Procedure would be applicable to proceedings under section 105 of the Act. Section 373 being applicable, the present suit for enhancement of rent under section 30(b) of the Bengal Tenancy Act is barred, as the previous application under section 105 of the Act was withdrawn without leave to prefer a fresh application. The subject-matter of the previous application, as also of the subsequent suit, is the same. The case cited by the other side is distinguishable. The decision in the case was passed before s. 107 of the Bengal Tenancy Act (VIII of 1885) was amended by Act III of 1898. Withdrawal of an application

under section 105 amounted to a dismissal on the merits. Therefore, regard being had to the provisions of sections 37 and 107 of the Bengal Tenancy Act, present suit of the plaintiff was not maintainable.

Babu Umakali Mukherjee, in reply.

Cur. adv. vult.

CHITTY AND TEUNON JJ. This appeal by the plaintiff arises out of a suit for rent in which the plaintiff also claimed enhancement on account of an alleged rise in the price of staple food crops, under section 30 (b) of the Bengal Tenancy Act. The plaintiff obtained a decree for the arrears of rent, but his claim to enhancement was rejected by both Courts on the ground that he had previously preferred an application for the same relief under section 105. It is admitted that an application under section 105 was preferred in 1906. The plaintiff did not, or could not, proceed with it, and accordingly applied for leave to withdraw it. This was allowed, but no leave was reserved to him to prefer a fresh application. He appealed on this point, and his appeal was dismissed on 3rd April, 1907. On 7th January he filed the present suit. In our opinion, an application under section 105 cannot be regarded as a suit. The cases of *Upadhya Thakur v. Persidh Singh* (1) and *Janardhan Misser v. J. Barclay* (Appeal from Order 31 of 1900) (2), decided with reference to section 104 (2) of the Act, as it originally stood, support this view. There does not appear to be any distinction between that and the present section, so far as this point is concerned.

Further, the application under section 105 having been withdrawn, it must be regarded as having been non-existent. There was no order passed under it which could be said to have the force and effect of

(1) (1896) L. L. R. 23 Calc. 723.

(2) Unreported.

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a decree under section 107, nor can it be said that there was a suit which was dismissed on the merits. The application under section 105 may have been withdrawn, under the provisions of O. XXIII of the Civil Procedure Code, but that would not convert it into a suit, which would bar a subsequent suit by reason of no leave to file such subsequent suit having been reserved. Moreover, it cannot well be said that the subject-matter of the application made in 1906 and the subject-matter of the suit brought in 1909 are the same.

In the above view of the case, section 37 and section 109 of the Bengal Tenancy Act have no application. The appeal must be allowed, the decrees in both the Courts set aside, and the case remanded to the Court of first instance for a trial on the merits of the plaintiff's claim to enhancement of rent. Cost of this appeal to be costs in the case.

S. C. G.

Appeal allowed; case remanded.