

S. Ghosh and ors. Vs. Jitendra Nath and ors.

S. Ghosh and ors. Vs. Jitendra Nath and ors.

SooperKanoon Citation : sooperkanoon.com/851621

Court : Kolkata

Decided On : Feb-08-1951

Reported in : AIR1951Cal45

Judge : Harries, C.J., ;G.N. Das and ;Banerjee, JJ.

Acts : Bengal Tenancy Act, 1885 - Sections 105, 105A, 107 and 109; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 11; ;Tenancy Law

Appeal No. : Full Bench Ref. No. 2 of 1950

Appellant : S. Ghosh and ors.

Respondent : Jitendra Nath and ors.

Advocate for Def. : Apurbadhan Mukherjee and ;Dwijendranath Mukherjee, Advs.

Advocate for Pet/Ap. : Hemanta Kumar, Adv.

Disposition : Appeal dismissed

Judgement :

G.N. Das, J.

1. This appeal is at the instance of deft. 1. It arises out of a suit instituted by the pltf. in the 1st Ct. of the Munsif, Howrah for a declaration of his nishkar (rent free) right in the disputed land, for correction of the entry in the record of rights to the

effect that the land is liable to assessment of rent, & for a further declaration that the ex parte order in a proceeding under Section 103, Bengal Tenancy Act, is not binding on the pltf. & for a permanent injunction restraining the deft. 1 from proceeding with a suit instituted by the latter for recovery of rent in respect of the disputed land.

2. The deft. 1 filed a written statement alleging that the disputed land was not nishkar & that the order under Section 105, Bengal Tenancy Act, was binding on the pltf. & precluded the latter from setting up a nishkar right.

3. The munsif dismissed the suit on the finding that the land was not nishkar & that the order under Section 105 was cogent evidence in proof of that fact.

4. The pltf. preferred an appeal to the Ct.. of the Dist. J. The appeal was heard by the-Subordinate Judge, 1st Ct., Howrah who allowed the appeal & decreed the pltf's suit on the finding that the land was nishkar & that the ex parte order under Section 105 was not conclusive to negative the nishkar right of the pltf.

5. The deft. 1 preferred this second appeal to this Ct. The appeal was heard by Sen & Chunder JJ. who were of the opinion that there was a divergence of judicial opinion on the point of the binding character of ex parte orders in Section 105 proceedings. As the question arose in a second appeal, an order was made referring the whole appeal to a F. B.

6. The question that arises, may be formulated as follows : Whether an ex parte order in a proceeding under Section 105, Bengal Tenancy Act, settling a fair & equitable rent in respect of a holding concludes the tenant from proving his nishkar right in a subsequent suit for declaration of such right.

7. Obviously no question of res judicata arises, because the Revenue Officer who decided the Section 105 proceeding is not competent to try the later suit for declaration of the nishkar right.

8. It was argued that finality of a decision in a Section 105 proceeding is provided for in Section 107. Section 107 lays down that the decision of the Revenue Officer in any proceeding under Section 105, Section 105A & Section 106 shall have the

force & effect of a decree of a civil Ct. in a suit between the parties & subject to the provisions of Sections 108 & 1150 shall be final. We have therefore, to enquire as to what is decided in an ex parte proceeding under Section 105.

9. Section 105 enables either the landlord or the tenant to apply to the Revenue Officer for settlement of fair & equitable rent in respect of the land held by the tenant. In a proceeding under Section 105 the scope of inquiry is limited to a decision of the question of quantum of fair & equitable rent payable for the holding. It was urged that such a decision implies that the land is liable to payment of rent & is not nishkar. That such a constructive adjudication is not to be regarded as a decision within Section 107 follows from the provisions contained in Section 105A.

10. Section 105A was added by the Amending Acts of 1907-1908 for the then Province of of East Bengal & West Bengal. The object of the amendment was to get rid of the difficulty experienced by Revenue Officers in setting fair rent where the tenant raised by way of defence, the issues which are now set out in Section 105A.

11. A proceeding under Section 105 proceeds on the assumption that the entries in the finally published record of rights are correct. Before the introduction of Section 105A, if the tenant sought to raise the issues stated in Section 105A he had to take recourse to a suit under Section 106. The proceedings for settlement of fair & equitable rent had to wait till the suit under Section 106 was finally decided upto the appellate Ct. This was a long & complicated procedure, The amendments in 1907-1908 got over this difficulty, by inserting Section 105A.

12. Section 105A empowered the Revenue Officer to try & decide the issues mentioned in Clauses (a) to (g) if such issues arise in the course of proceedings under Section 105. Such issues arise when a party to the proceedings asserts the proposition involved in the issue & the assertion is denied by the other party. It is only then that the Revenue Officer proceeds to try & decide the issue raised & his decision becomes final under Section 107. If no issue as is set forth in Clauses (a) to (g) of Section 105A is raised, the Revenue Officer is not called upon to try & decide the issue but he merely settles the fair & equitable rent. In such a case there is no decision by the Revenue Officer on any of these issues & no question

of finality under Section 107 arises.

13. Clause (a) of Section 105A relates to the question whether the land is or is not liable to the payment of rent. If the tenant appears & raises the question of nishkar, the Revenue Officer is required to try & decide the question, & his decision on this question becomes final. But where the tenant does not appear in Section 105 proceedings & no question is raised as to the nishkar character of the land, the Revenue Officer is not concerned to decide the question. He merely settles the fair & equitable rent. His decision is confined solely to the question of the amount of fair & equitable rent of the holding which was the only matter before him. The finality provided for in Section 107 is limited in such cases to the determination of the quantum of fair & equitable rent.

14. Section 109, Bengal Tenancy Act, is also of no help to the applt. It rather supports the view taken above.

15. The relevant portion of Section 109 reads as follows :

'Subject to the provisions of Section 115C, a Civil Ct. shall not entertain any appln. or suit concerning any matter which is or has already been the subject of an appln. made, suit instituted or proceedings taken under Sections 105 to 108 inclusive.

Provided that nothing contained in the section shall debar a civil Ct. from entertaining a suit concerning any matter which

(a) * * * *

(b) has not been finally adjudicated upon in any such proceeding or suit.'

16. The bar imposed by the section has reference to the matter which was the subject of the appln. under Section 105 & was finally adjudicated upon.

17. As already pointed out the subject-matter of the appln. under Section 105 is only the settlement of fair & equitable rent, where no issue under Section 105A arises. It is only the matter of fixing the fair & equitable rent which is finally adjudicated upon in such cases.

18. The conclusion, therefore, follows that an ex parte order under Section 105, Bengal Tenancy Act, settling a fair & equitable rent in respect of the land held by the tenant is final only on this matter & is not final as regards the issues mentioned in Clauses (a) to (g) of 105A unless such issues arise in the course of the Section 105 proceedings.

19. The decisions of this Ct. which have taken a contrary view must be deemed to have been wrongly decided & are overruled.

20. The question referred to the P. B. is answered accordingly.

21. In the present case, the ex parte order under Section 105 does not show that the issue as to the nishkar character of the holding arose before the Revenue Officer or that he decided the same. The ex parte order is not accordingly binding on the pltf. as regards the nishkar right claimed.

22. As the question arose in a second appeal, the whole appeal was referred to the P. B.

23. The finding of the lower appellate Ct. is that the pltf. acquired the nishkar right on the basis of a lost grant. This finding is based on two facts viz., an admission made by an authorised agent of the landlord in a cess return filed in 1925 & the long possession of the pltf. & his predecessors-in-interest for 40/50 years without any demand or payment of rent to the landlord.

24. It is not disputed on behalf of the applt. that these facts are sufficient to support the finding of the Subordinate Judge as regards the nishkar right of the pltf.

25. It was first contended that the findings of fact are not supported by the evidence on record.

26. The learned Subordinate Judge has referred to the evidence in support of his findings. As such his conclusions based on evidence relevant & admissible in law, cannot be assailed in second appeal.

27. It was next contended that it was not open to the Subordinate Judge to inquire into a case of acquisition of nishkar right on the basis of a lost grant, as there was

no such case raised in the plaint.

28. A perusal of the plaint, however, makes it abundantly clear that necessary averments in proof of such a title were made in the plaint. The plaint recited long possession without payment of rent in assertion of a nishkar right & referred to the admission of nishkar right by the landlord in the cess return. The plea was also debated in both the Cts. below. There is thus no substance in this contention.

29. It was finally contended that the decree is not correct in so far as it declares the imperativeness of the Section 105-proceedings. The meaning of this declaration is clear. What the Subordinate Judge meant is that the ex parte order in the Section 105 proceedings does not affect the nishkar right of the pltf.

30. The result is that this appeal fails & therefore is dismissed. The pltf. is entitled to his costs of the hearing before us & before the D. B.

Harries, C.J.

31. I agree.

Banerjee, J.

32. I agree with Das J. in the answers he has given. I desire to add a few words.

33. Section 109, Bengal Tenancy Act, provides that a civil Ct. shall not entertain any appln. or suit concerning any matter which is or has already been the subject of an appln. made, suit instituted or proceedings taken under Sections 105 to 108 (both inclusive): provided that nothing in the section shall debar a civil Ct. from entertaining a suit concerning any matter which (a) was the subject-matter of an appln. under Section 105 or Section 105A, or of a suit under Section 106 if such appln. or suit has been dismissed for default or withdrawn, or (b) has not been finally adjudicated upon in any such proceeding or suit. In other words, the decision of the Revenue Officer is final.

34. Of course this is subject to the provisions of Section 115C which provides for appeals from decisions of Revenue Officers. It is well settled that when an appeal

is preferred, the order or decree against which the appeal is preferred loses its finality. The decree or order of the appellate tribunal supersedes the decree or order of the Ct. below. Subject to this, Section 109 makes the matter adjudicated upon by the Revenue Officer final. The words in the section 'which is' read with the words of proviso (b) make it clear that until there is adjudication upon a matter by a Revenue Officer, the civil Ct. is not deprived of its jurisdiction to entertain a suit concerning the matter.

35. In this case the Revenue Officer settled a fair & equitable rent for the land in question. That finding implies that the land in question is liable to the payment of a rent. But the question before us is whether this liability is finally determined & cannot be questioned in any civil Ct.

36. The solution of this problem is afforded by Section 105A. Ordinarily, decision of a revenue Ct. on a question of title is no bar to the trial of the same question by the ordinary civil Ct. The Legislature, however, can empower the revenue Ct. to determine questions of title so as to constitute it pro tanto a civil Ct. Revenue Cts. are chiefly Cts. of jurisdiction limited to adjudicate upon questions of rent, tenure etc. There are however some matters of which the decision by revenue Ct. is expressly declared by the Act constituting the revenue Ct. to have the force of a decree in a civil Ct. & some as to which it is declared that the decision shall be final. In such cases, the decision of a revenue Ct. will operate as res judicata so as to bar the trial of the same matter in a civil Ct.

37. Under Section 105, Bengal Tenancy Act, an appln. can be made for settlement of a fair & equitable rent by a Revenue Officer, in cases where the settlement of land revenue is not being or is not about to be made. His only duty, therefore, is to settle the rent & nothing else. But Section 105A says that where in any proceeding for the settlement of rent under this part (chap, x) any of the issues specified in the section arise, 'the Revenue Officer shall try & decide such issue & settle the rent under Section 105.' One of the issues specified is (a) whether the land is, or is not liable to the payment of rent.

38. The section is mandatory. The words are 'the Revenue Officer shall try & decide...' The Revenue Officer must try & decide the issue. In other words, the

Legislature expressly empowers & directs the revenue Ct. to decide the issue & he must do it. But he can do so only when the issue arises & not otherwise. Now, when does an issue arise Issues arise when a material proposition of fact or law affirmed by one party is denied by the other. It follows therefore that when a matter is heard ex parte & there is no denial of a fact or a proposition of law, no issue arises. If, therefore, to a landlord's appln. for settlement of a fair & equitable rent there is no appearance, the tenant does not deny the facts stated in the appln. & there is no issue to try. But some of the decisions of our Ct. have applied the principle of constructive res judicata in such cases. They proceed on the principle that the matter is constructively in issue. A matter is said to be constructive in issue when it might & ought to have been made a ground of attack or defence. Matters are actually in issue when they are actually alleged by one party & denied by the other. But it often happens that a matter which might & ought to have been made a ground of attack by the pltf. to entitle him to the relief he claims in the suit is not actually alleged by him as a ground of attack. Likewise it happens that a matter which might & ought to have been made a ground of defence by the deft is not actually set up by him as a ground of defence. In such cases the Explan. 4 to Section 11, C. P. C., says that a matter, which might & ought to have been made a ground of attack or defence in the former suit but which has not been actually alleged as a ground of attack or defence, will be deemed to have been a matter directly & substantially in issue in such suit. In other words, though it is not actually in issue, it is regarded as being in issue. The word 'deem' suggests that it is not; but it is regarded as being in issue & is deemed to have been decided. Can we apply this principle to an issue which does not actually arise in any of the proceedings under Sections 105 to 108, Bengal Tenancy Act Section 105A nowhere empowers the revenue Ct. to decide any of the matters specified in that section until & unless it arises. There is no suggestion anywhere in the section that a Revenue Officer can decide a matter which does not actually arise but may be 'deemed' to have arisen.

39. A tribunal is competent only to decide matters which the Legislature commits to its decision & no other. Its jurisdiction must be found within the four corners of the enactment which confers the jurisdiction. Having regard to what I have said & to the nature of a revenue Ct. I am unable to hold that % Revenue Officer is

entitled to try & decide any matter specified in Section 105A which does not actually arise before him. In other words my view is that the doctrine of constructive res judicata does not apply to a decision of a Revenue Officer on any matter mentioned in Section 105A.

40. During the argument an illustration was taken which is as follows. Suppose, a matter does not actually arise, that is to say, it is not actually stated or traversed, but the Revenue Officer of his own accord raises an issue & actually tries & decides it. Will that be res judicata in a suit I am clear in my own mind that the answer must be in the negative. But it is not necessary to express any final opinion on this point because in this case the question as to whether the land in question is liable or not to pay rent was not raised &/or tried &/or decided. That is admitted by applt's counsel.

41. I am therefore of opinion that the civil Ct. can entertain the suit for a declaration that the land in question is not liable to pay any rent.

42. I concur in the answers given.