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A.B. Chiodith Vs. Tulsi Singh

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Court : Kolkata

Decided On : Dec-09-1912

Reported in : 18Ind.Cas.130

Judge : Chitty and ;Teunon, JJ.

Appellant : A.B. Chiodith

Respondent : Tulsi Singh

Judgement :

1. 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 23 C. 723 and Jonardhan Misser v. J. Barclay App. from Order No. 31 of 1900 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.

2. Further, the application under Section 105 having been withdrawn, it must be regarded as having been non-existent.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 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 The application under Section 105 may have been withdrawn under the provisions of Order XXIII of the Civil Procedure Code but that would not convert it into a suit, which would bar a subsequent suit by reason of no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.

3. In the above view of the case, Section 87 and Section 103 of the Bengal Tenancy Act have no application. The appeal must be allowed, the decrees of 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. Costs of this appeal to be costs in this case.

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