

section 20, is a tenant described in section 8 and not a tenant who under a contract with the zamindar holds at a fixed rate of rent. Therefore section 20 has no application to the tenancy in question, and the devolution of such a tenancy after the death of the tenant, must be in accordance with the provisions of section 22. In the list of heirs mentioned in that section the sister finds no place. Therefore the plaintiff has no right to the property which is in controversy in this appeal, and that property passed to the appellant, the widow of the deceased, there being no lineal descendants in the main line of descent. I may also observe that in the plaint the 17 bighas 6 biswas 10 dhurs of land in question are described as an occupancy holding. The Court below was therefore wrong in decreeing the claim in regard to this property and this appeal must prevail. I accordingly allow the appeal with costs, and, varying the decree of the Courts below, dismiss the plaintiff's claim in respect of the 17 bighas 6 biswas 10 dhurs of land known as the holding of Rang Lal, with proportionate costs in this Court and in the Courts below.

1905

BACHCHI
alias
BACHCHIA
v.
BACHCHI.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, and Mr. Justice Aikman.

1906
June 7.

SITA RAM SINGH (DEFENDANT). v. POKHPAL SINGH AND ANOTHER
(PLAINTIFFS).*

Suit for profits—Previous suit dismissed because one of the defendants not summoned—Civil Procedure Code, section 99A.

A suit for profits for the years 1301, 1302 and 1303 Fasli, brought by the present plaintiffs against the appellant and two other defendants, was dismissed owing to the plaintiffs' failure to cause one of the defendants to be summoned. The plaintiffs now sued the same three defendants for profits for the years 1302, 1303 and 1304 Fasli.

Held, that it was open to the plaintiffs, subject to the law of limitation, to bring the present suit and that the case was governed by the principle embodied in section 99A of the Code of Civil Procedure.

THIS was a suit for profits for the years 1302, 1303 and 1304 Fasli. There were three defendants to the suit, namely, Sita

* Second Appeal No. 785 of 1904, from a decree of J. H. Cuming, Esq., Additional District Judge of Aligarh, dated the 10th of May 1904, confirming the decree of Mr. Babu Dip Chand Rathore, Assistant Collector of Bulandshahr, dated the 25th of September, 1903.

1906

SITA
RAM
SINGH
v.
POKHPAL
SINGH.

Ram, Dambar Singh and Balmakund. A portion of the claim was decreed by an Assistant Collector against Sita Ram alone. Both parties appealed. The Additional District Judge dismissed Sita Ram's appeal and partially decreed that of the plaintiffs. The defendant Sita Ram appealed to the High Court. There it was urged that the claim for the years 1302 and 1303 Fasli was barred in consequence of an order passed by an Assistant Collector on the 4th of June, 1897, in a previous suit in which the present plaintiffs claimed against the same defendants profits for the years 1301, 1302 and 1303 Fasli. In that suit one of the defendants, Balmakund, was not served. The Assistant Collector gave the plaintiffs two days within which to publish correct particulars of his address, and, on their failure to do so, dismissed the suit, not only as against Balmakund, but as against the other defendants who had been served. The plaintiffs applied for a review of that order, but their application was rejected.

Babu *Balram Chandra Mukerji* (for Dr. *Satish Chandra Banerji*), for the appellants submitted that the order of the Assistant Collector dismissing the suit in 1897 amounted to a dismissal under section 102 of the Code of Civil Procedure, and consequently section 103 precluded the plaintiffs from bringing the present suit. If section 102 did not apply, section 158 of the Code applied. The plaintiffs were ordered to do something material for the further progress of the suit and they failed to do it. The Assistant Collector's order might have been unjustifiable, but so long as it stood unreversed, the plaintiffs could not bring a fresh suit. Section 148 of Act VIII of 1859 corresponded to section 158 of the present Code. It had been held in *Venkata-chalam v. Mahalakshmanma* (1) that a dismissal under the former section operated as *res judicata*.

Mr. *G. W. Dillon*, for the respondents, submitted that the Assistant Collector had no power to dismiss the suit. Section 158 was a general section. It would not apply; but the special section 99A of the Code of Civil Procedure was the section which was applicable to the present case.

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiffs, who are respondents here, to recover profits due to

(1) (1887) I. L. R., 10 Mad., 272.

them on account of the years 1302, 1303 and 1304 Fasli. There were three defendants to the suit, namely, the present appellant, Sita Ram and two others, Dambar Singh and Balmakund. A portion of the claim was decreed by the Assistant Collector against Sita Ram alone. Both parties appealed. The learned Additional District Judge dismissed Sita Ram's appeal and partially allowed the plaintiffs'. Sita Ram comes here in second appeal.

The only plea urged before us is that the suit against the appellant is barred as regards the claim for the years 1302 and 1303 Fasli in consequence of an order passed by an Assistant Collector on the 4th of June, 1897. It appears that in a previous suit the present plaintiffs claimed against the same three defendants profits for the years 1301, 1302, and 1303 Fasli. One of the defendants, Balmakund, was not served. The Assistant Collector gave the plaintiffs two days within which to give correct particulars of his address. On the plaintiffs failing to do so the suit was dismissed, not only as against Balmakund, but as against the other defendants who had been served. The plaintiffs applied for a review of that order, but their application was rejected. The only question we have to consider now is, whether that order can be held to bar the present suit against Sita Ram as regards the profits of 1302 and 1303 Fasli. The case was once before this Court in an appeal from an order of remand. Dambar Singh was the only appellant in that case.

The learned vakil for the appellant relies on a remark made in the judgment in that case to the effect that the order of the Assistant Collector, passed in 1897, had become final as regards Sita Ram and Dambar. A perusal of the whole of the judgment shows clearly that this remark was merely *obiter*. Later on in the judgment the following passage occurs:—"Against this order, *i.e.* (the order of remand) one of the respondents, Kunwar Dambar Singh alone appeals, and we must be understood as considering his case alone." I am of opinion that what took place in 1897 cannot bar the present suit against Sita Ram to recover the profits of 1302 and 1303 Fasli. It is perfectly clear that the provisions of section 13 of the Code of Civil procedure do not apply, and the learned vakil for the appellant has not been able to

1906

SITA
RAM
SINGH
v.
POKHPAL
SINGH.

1906

SITA
RAM
SINGH
v.
POKHPAL
SINGH.

refer us to any other statutory bar to the suit. The previous suit was dismissed owing to a failure of the plaintiffs to cause one of the defendants to be summoned. No doubt, the dismissal of the suit against Sita Ram and Dambar was not warranted by any provision of law, but at the same time there was no decision whatever on the merits, and we consider that the principles embodied in section 99A of the Code of Civil Procedure (there being no provision of the Rent Act directly applicable), should govern this case, and that it was open to the plaintiffs, subject to the law of limitation, to bring this fresh suit.

The above was the only plea urged before us, and in my opinion it fails. I would therefore dismiss this appeal with costs.

STANLEY, C.J.—I concur in the proposed order.

KNOX, J.—The order in the former suit between the present parties, in which the question in issue in the suit out of which this appeal has arisen was directly a substantial issue, has not been produced. At any rate it has not been shown to us as being upon the record. The question was not heard and finally decided, and we have not been shown any other provision which would bar the bringing of a fresh suit by the respondents. I therefore concur in the order proposed.

By THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.