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undoubtedly applicable and it would entitle the tenant to take up the attitude either that as he is no longer in possession of the landlord's share of the land held by him there ought in equity to be an apportionment of that which was hitherto payable by him to the landlord on account of the use or occupation of his share of the land; or that the condition under which he agreed to pay to the landlord his share of the rent no longer exists and that he would not pay to the landlord his share of rent unless all the landlords join in bringing a suit as against him or unless the co-sharer landlord consents to an apportionment of rent. A relief given to the tenant in a suit by a co-sharer landlord for his share of the rent does not in any way touch the integrity of the rent, for the subject-matter of the suit is not rent but that which is payable to the co-sharer landlord by the tenant on account of the use or occupation of the co-sharer landlord's share of the land.

In my opinion there is no answer to the claim put forward on behalf of the tenants in these cases. The decision of the learned Judge in the Court below is, in my opinion, right and I would dismiss these appeals with costs.

COUTTS, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Mullick, J.

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July, 27.

JANKI RAY

v.

RAJA KALANAND SINGH.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 158—*application for assessment of rent, dismissal of, for*

*Second Appeal No. 839 of 1920, from a decision of Babu Kamala Prashad, Officiating Subordinate Judge of Monghyr, dated the 16th June, 1920, modifying a decision of Babu Narendra Lal Bose, Munsif of Monghyr, dated the 28th November, 1919.

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default—whether subsequent suit for compensation for occupation and for assessment of rent is barred—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order* IX, *rules* 8 *and* 9.

Where a claim for assessment of rent under section 158 of the Bengal Tenancy Act, 1885, was dismissed for default under Order IX, rule 8, of the Code of Civil Procedure, 1908, in 1915, and in 1919 the landlords instituted a suit claiming (*a*) compensation from the defendant for occupation of the same land in respect of the three years preceding the institution of the suit and (*b*) a determination of the annual rent payable by the defendants, *held*, that the claim for determination of the annual rent payable by the defendants was not barred by Order IX, rule 9, inasmuch as an application under section 158 of the Bengal Tenancy Act is not a suit within the meaning of Order IX, rule 9.

Berhamdutt Misser v. *Ramji Ram*(1), referred to.

Second Appeal by the defendants first party.

In 1915 the plaintiffs, the landlords, applied under section 158 of the Bengal Tenancy Act for assessment of rent. The application was dismissed for default under Order IX, rule 8. In 1919 the landlords instituted the present suit in respect of the same land and against the same tenants, for compensation for occupation of the land for the three years preceding the date of the suit and for determination of the amount of the annual rent payable by the defendants. The defendants pleaded *inter alia* that the application under section 158, Bengal Tenancy Act, having been dismissed for default under Order IX, rule 8, the present suit was barred by rule 9. The trial Court awarded the plaintiff a certain sum as compensation for use and occupation of the land and determined the amount of the annual rent. The defendants first party appealed, the defendant second party being a mere *pro forma* defendant. The rate of rent was decreased by the appellate Court. The defendants first party having appealed to the High Court it was contended on their behalf that the application under section 158,

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Bengal Tenancy Act, having been dismissed for default under Order IX, rule 8, the present suit was barred by rule 9.

Kulwant Sahay and *Sant Prasad*, for the appellants.

C. C. Das, for the respondents.

DAWSON MILLER, C.J.—This is an appeal brought on behalf of the defendants against a decision of the Subordinate Judge of Monghyr affirming with slight modifications the decree of the Munsif. The suit was instituted in 1919 by the plaintiffs as landlords against the defendants as tenants claiming compensation for occupation of certain land for the last three years and a determination of the annual amount of rent payable by the tenants. The only question which arises in this appeal is whether the decree of the lower appellate Court assessing the rent at a certain rate according to the nature of the different plots of land is barred by reason of Order IX, rule 9, of the Civil Procedure Code. It appears that a claim for assessment of rent was preferred by the same plaintiffs against the same defendants in respect of the same land in the year 1915. That application failed for default and was dismissed. The defendants contend that under the provisions of Order IX, rule 9, the previous suit having been dismissed under rule 8 of that Order, the plaintiffs are precluded from bringing a fresh suit in respect of the same cause of action. The question which we have to determine in the present appeal is whether Order IX, rule 9, applies to a case like the present at all. The rule applies only to the case of suits and the relief sought in the present instance in so far as it is for past rent is clearly not a relief which is barred by any previous suit for past rent in the year 1915 and that indeed is not suggested. In so far as the relief sought is for assessment of fair rent in a case where no rent has been paid previously or where no rent has been agreed previously it is not a suit at all. The only provision for asserting a claim of that sort is under

section 158 of the Bengal Tenancy Act which provides that the Court having jurisdiction to determine a suit for the possession of land may on the application of either the landlord or the tenant determine certain matters, amongst others the rent payable by the tenant at the time of the application. But for that section the plaintiffs would have no cause of action at all. They would certainly have no right to bring a suit for the assessment of rent merely on the ground that the tenant was in possession and that no agreement had been come to between him and the landlords as to the proper amount of rent payable. That must primarily be a matter of contract between the parties and no Court will make a contract for the parties or give enforcement to a contract which has not in fact been made between the parties. But under the special provisions of section 158 of the Bengal Tenancy Act the plaintiffs have a right in such a case to apply for assessment of rent. Therefore in so far as the matters now under appeal concern merely an application under section 158 of the Bengal Tenancy Act they clearly cannot be regarded as a suit within the meaning of Order IX, rule 9. It is contended, however, on behalf of the appellants that section 158 of the Bengal Tenancy Act has no application in the particular circumstances of the present case. It is said that that section at the most only applies to cases where the landlord asks that it may be determined what is the rent payable by the tenant at the time of the application and therefore if there is already in existence an agreement between the parties as to the rent payable the Court has no power to disregard that agreement and make a new agreement for the parties even if it considers that the rent payable is not fair and equitable, because that would be in fact enhancing the rent which the Court has no right to do under section 158. I entirely agree that if there is already in existence an agreement between the parties as to the amount payable the Court in an application like the present has only to consider what was the amount payable under that agreement and cannot

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substitute therefor some other amount even if it should think that that would be more equitable. If, however, it should turn out that there is in fact no agreement between the parties as to the amount of rent payable, then I think that the case is governed by the decision in *Berhamdutt Misser* v. *Ramji Ram* (1) where it was laid down that in such a case, that is to say where there is no existing agreement between the parties, the Court has power under section 158 (*1*) (*d*) to ascertain, in the absence of such agreement, what is the proper rent payable and to determine that under the provisions of the section. In the present case the defendants say that it is shown by the evidence that there was in fact an agreement between the parties to pay rent for the land in suit upon the same basis as they had previously held the lands. It appears that some years ago, in the year 1896, the landlords obtained a decree for rent against the defendants or their predecessors and having put up the land for sale purchased it themselves. Sometime later the defendants applied for a fresh settlement and they were in fact settled on the land by the plaintiffs, and their contention is that at that time the agreement between themselves and the plaintiffs was that they should pay the rent which they had previously paid when they had formerly held the lands. If that case could be made out I entirely agree that the only function of the Court could be to ascertain what the previous rent was but it seems to me that in the judgment of the lower appellate Court there is a distinct finding that there was no such agreement as that contended for. First of all the record-of-rights which was finally published in the year 1908 after the defendants were re-settled on the lands records this land as *belaqan kabil laqan* which means that no rent has been settled for the land but it is the class of land for which rent is assessable. The presumption, therefore, was that no rent had been settled between the parties for this land, and, therefore, when the matter was before the trial Court and again before the

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Subordinate Judge on appeal they had to consider whether the evidence called by the parties was sufficient to rebut that presumption. The conclusion they came to was that the resumption had not been rebutted and that the land was in fact, as recorded in the record-of-rights, *kabil lagan*. The suggestion put forward by the defendants was that they had approached the plaintiffs' manager and that he had offered them the land upon paying a *salami* of Rs. 500 at the old rental and issued a *parwana* to that effect, the terms being that the lands were to be settled at the old rental, 4½ *bighas* at a *naqdi* rental and the remainder on a produce rent and that the defendants were to execute a *kabuliat* in respect of the settlement. The evidence showed that the defendants never did execute a *kabuliat* in respect of this land and it further shows that they never did in fact pay a *salami* of Rs. 500, although they paid a sum of Rs. 250 and they say that they agreed to pay the rest by instalments, but there is no evidence that it was ever paid. Further there was no evidence at all to indicate that the defendants have accepted the terms put forward by the manager in the *parwana* or agreed to pay the rental which was offered to them and in fact from that day to this as far as the evidence goes they have never paid any rent at all and there has been a dispute going on between the parties as to the exact amount of rent payable. In these circumstances the Judge, even if we had any power to interfere with his finding, was perfectly justified in arriving at the conclusion that the record-of-rights had not been rebutted. He, therefore, found in favour of the plaintiffs and assessed the land as I have already said at various rates as being the rent payable at the time of the application. In my opinion the appellants' contention fails and this appeal should be dismissed with costs.

MULLICK, J.—I agree. So far as the claim for an assessment of fair and equitable rent is concerned the plaint must be treated as an application under

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section 158 of the Bengal Tenancy Act and the present proceeding is not barred under the provisions of Order IX, rule 9, of the Civil Procedure Code which is only applicable to suits.

Appeal dismissed.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Dawson Miller, C.J. and Mullick, J.

1922.

August, 1.

RAM SEKHAR PRASAD SINGH

v.

SHEONANDAN DUBEY.

Court-Fees Act, 1870 (*Act VII of* 1870), *sections* 5 *and* 7(iv)(c)—*Taxing Officer, finality of decision of—Suit for declaration and "confirmation of possession", court-fee payable on—consequential relief, how to be valued—Suits Valuation Act*, 1887 (*Act VII of* 1887), *sections* 3, 4 *and* 8.

Under section 5 of the Court-Fees Act, 1870, the decision of the Taxing Officer is final and even if he has done anything which the law does not allow him to do the High Court has no jurisdiction to interfere with his decision as to the amount of the fee.

Balkaran Ray v. *Gobindnath Tewari*(1), *Kunwar Karan Singh* v. *Gopal Rai*(2), *Lagan Bart Kuer* v. *Khakhan Singh*(3), and *Mussammat Chanderbati Kuer* v. *Gorey Lall Singh*(4), followed.

Section 7(*iv*)(*c*) of the Court-Fees Act applies to a suit for a declaration of title and confirmation of possession.

Bahuroonissa v. *Kureemoonissa Khatoon*(5), *Jhumak Kamti* v. *Debu Lal Singh*(6), and *Dina Nath Das* v. *Rama Nath Das*(7), followed.

(1) (1890) I. L. R. 12 All. 129, F.B.
(2) (1910) I. L. R. 32 All. 59.
(3) (1918) 3 Pat. L. J. 92.
(4) (1919) 4 Pat. L. J. 700.
(5) (1872) 19 W. R. 18.
(6) (1915) 22 Cal. L. J. 415.
(7) (1916) 23 Cal. L. J. 561.