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 RAMA GOPAL  
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bringing a fresh suit for enhancement of rent of an occupancy holding. Section 9 of the Act is different from the provisions of section 37. Section 9 does not provide that the dismissal of a suit on merits would debar the maintainability of a fresh suit for enhancement of rent. If that is so, the dismissal of a suit for default cannot debar the plaintiff from bringing a fresh suit for enhancement of rent of a tenure. I am of opinion that the cause of action in the present suit is not the same as the cause of action in the previous suit and therefore the present suit is maintainable.

The decision of the learned District Judge will therefore be set aside and the appeal remanded to him for decision of the question as regards the amount of enhancement to which the plaintiff is entitled. Costs will abide the result.

JAMES, J.—I agree.

*Appeal remanded.*

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## APPELLATE CIVIL.

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*Before Kulwant Sahay and James, JJ.*

RAGHU RAM PANDEY

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 July, 14.

v.  
 DEOKALI PANDE.\*

*Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 89, payment under—sale, validity of, whether can be challenged by person making the payment—refund of the money deposited, suit for, whether maintainable.*

Where a property has been sold in execution of a money decree and a payment is made under Order XXI, rule 89,

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\* Appeal from Appellate Decree no. 941 of 1924, from a decision of Babu Jatindra Chandru Basu, Subordinate Judge of Purnea, dated the 14th March, 1924, confirming a decision of Babu Gajadhar Prasad, Munsif of Purnea, dated the 20th February, 1922.

Code of Civil Procedure, 1908, the person making such payment must accept the validity of the sale and cannot, therefore, maintain a suit for setting aside of the sale and a refund of the money deposited by him.

*Kunja Behari Singh v. Bhupendra Kumar Dutt* (1), and *Narayan Vasudevacharya Ketti v. Amqanda Mulaganda Patil* (2), followed.

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### Appeal by the defendants.

Defendants nos. 1 and 2 obtained a money decree against the defendant no. 3 on the 16th January, 1917. The decree was obtained on the basis of a bond executed by Musammat Jaimani, the mother of defendant no. 3 and there was a direction in the decree to the effect that the decretal amount will be realised out of the assets inherited by defendant no. 3 from her mother. Defendant no. 3 conveyed all the properties which she had inherited from her mother as well as from her father to the plaintiffs under a deed of gift dated the 3rd April, 1917, and the plaintiffs objected to the sale of the property in execution of the decree on the ground that the property attached was not the property forming the assets of the mother of defendant no. 3. This objection of the plaintiffs was disallowed and the property was sold on the 2nd May, 1921. The plaintiffs thereupon deposited the decretal amount and the compensation under the provisions of Order XXI, rule 89, of the Code of Civil Procedure and soon thereafter instituted the present suit for a declaration that the property attached and sold belonged to the plaintiffs and that defendant no. 3 or her mother had no right or interest therein. On a determination of the plaintiffs' title to the property sold a permanent injunction was asked for restraining the defendants 1 and 2 from taking out execution by attachment and sale of the properties forming the subject matter of the suit. There was a further prayer for a temporary

(1) (1907-08) 12 Cal. W. N. 151. (2) (1921) I. L. R. 45 Bom. 1094.

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injunction restraining the defendants 1 and 2 from withdrawing the deposit made by the plaintiffs under Order XXI, rule 89, of the Code. It appeared that in the meantime the money had been withdrawn by the defendants 1 and 2 and the plaintiffs thereupon asked for an amendment of the plaint by the insertion of a prayer for a refund of the money withdrawn by the defendants 1 and 2 and the amendment was accordingly made.

The defence of the defendants 1 and 2 was that the suit was not maintainable and that the property did not belong to the plaintiffs but was the property forming the assets of the mother of defendant no. 3. Both the Courts below have held that the property belonged to the plaintiffs. The Munsif found that the suit was maintainable. The Subordinate Judge on appeal did not deal with this question in his judgment.

*S. N. Bose* (for the appellants.)

*Hasan Jan* (for the respondents.)

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows:) The point taken on behalf of the defendants 1 and 2 in this second appeal is that the plaintiffs having made the deposit under Order XXI, rule 89, of the Code of Civil Procedure, it was not open to them to challenge the validity of the sale and to ask for a refund of the deposit made by him. The decision of the point depends on the true meaning and scope of Order XXI, rule 89, of the Code of Civil Procedure. A person who objects to the attachment and sale of a property on the ground that the property did not belong to the judgment-debtor, has his remedy by an application under Order XXI, rule 58, of the Code. He can also stop the sale by making a deposit under protest. If the property sought to be sold does not really belong to the judgment-debtor, then the sale of the property in execution of a money decree will not affect the

rightful owner of the property and he can ignore the sale and resist the auction purchaser in his attempt to take possession of the property after the sale. A person who is the owner of the property is not affected by a sale of the right, title and interest of the judgment-debtor to whom the property does not belong. In the present case the plaintiffs did object to the sale under Order XXI, rule 58, and their claim was disallowed. They allowed the sale to take place and then made a deposit under Order XXI, rule 89.

Now the object of Order XXI, rule 89, is to enable the judgment-debtors or persons interested in the property sold to have the sale set aside on paying up the decree and compensation within thirty days of the sale. It gives a period of grace to the judgment-debtor or to the person interested in the property to have the sale set aside on making the payment provided for in the rule. When the payment is made under rule 89, the person making the payment must accept the validity of the sale. He cannot make a payment under Order XXI, rule 89, and at the same time challenge the validity of the sale. A payment under rule 89 must be an unconditional payment with the object of the money being paid to the decree-holder. Once a payment is made under Order XXI, rule 89, it is clear that the person making the payment cannot be heard to say that the sale was not a valid sale and that the money deposited should not be paid to the decree-holder. The judgment-debtor or the person interested is under no compulsion to make the deposit under Order XXI, rule 89. Such a deposit is a voluntary deposit and the person making the deposit cannot in my opinion maintain a suit for a refund of the money deposited by him.

In *Narayan Vasudevacharya Katti v. Amgauda Malagauda Patil* (1) it was held that under the terms

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of Order XXI, rule 89, the amount deposited must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and therefore no suit would lie for its recovery. There also an objection was taken to the sale. The objection was disallowed and the property was sold and the plaintiff made a deposit after the sale under Order XXI, rule 89, and thereafter instituted a suit for a refund of the money deposited by him on the ground that the deposit had been made by him involuntarily.

The learned Advocate for the respondents relies on a passage in the judgment of the learned Chief Justice [at page 1100 of the report] where his Lordship observes as follows:—

“ But assuming that the property itself was sold there may be a difficulty in distinguishing between a payment made under protest to get rid of an attachment and a payment made under protest to get a sale after attachment set aside. But we do not even know whether the payment was made under protest ”,

and reference is made to the statements in prayer no. 5 of the relief portion in the plaint where it is stated that the deposit was made by the plaintiff under protest. At page 1102 of the report, however, his Lordship clearly says that once property had been sold, the sale could not be set aside by a payment into Court under protest.

The observation of the learned Chief Justice of the Bombay High Court quoted above follows another sentence in which his Lordship had observed that ordinarily what the Court would have sold was the right, title and interest of the judgment-debtor, if any, in the property and not the property itself and if the plaintiff, to suit his own convenience, got rid of the sale of the judgment-debtor's right, title and interest in the property by paying the decretal amount into Court, it is quite clear that he could not

recover the amount as having been involuntarily paid; and the learned Advocate for the respondents refers to certain statements in the plaint to the effect that in the present case the property itself was sold. It is difficult to understand how the property itself could be sold in execution of a money decree. At such a sale only the right, title and interest of the judgment-debtor can be sold. Whether it was specifically stated in the sale proclamation that what was sold was the right, title and interest of the judgment-debtor or not, the effect of the sale of a property in execution of a money decree always is to pass the right, title and interest of the judgment-debtor and nothing more.

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In *Kunja Behari Singha v. Bhupendra Kumar Dutt* (1) it was held that when a property belonging to *A* was sold in execution of a decree against *B* and *A* had the sale set aside by making a deposit under section 310A of the Civil Procedure Code of 1882, *A* had no right to sue the decree-holder for recovery of the amount of the deposit money paid to him and the reasons assigned by Woodroffe, J., for the decision were that the remedy of the person who was the owner of the property was not under section 310A for he was not affected by the execution proceedings and that the deposit had not been made by him for the purpose of staying the execution.

I am therefore of opinion that the present suit was not maintainable having regard to the provisions of Order XXI, rule 89, of the Code of Civil Procedure. The appeal must therefore be allowed and the decree of the learned Subordinate Judge must be set aside and the suit dismissed with costs throughout.

JAMES, J.—I agree.

*Decree set aside.*

*Suit dismissed.*