

APPELLATE CIVIL.

Before Kulwant Sahay and James, JJ.

RAJA GOPAL RAY BAHADUR

1927.

July, 18.

v.

TAJ MUHAMMAD.*

Code of Civil Procedure, 1908 (Act V of 1908) Order IX, rule 8—suit for enhancement of rent of a tenure, dismissal of, for default—fresh suit within fifteen years, whether maintainable—Bengal Tenancy Act, 1885 (Bengal Act VIII of 1885), sections 9 and 37.

The dismissal of a suit for enhancement of rent of a tenure, under Order IX, rule 8, Code of Civil Procedure, 1908, does not bar a fresh suit for enhancement within fifteen years of the dismissal.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

A. K. Ray, for the appellant.

B. N. Mitter, for the respondent.

KULWANT SAHAY, J.—This appeal arises out of a suit for enhancement of the rent of a tenure. Upon the merits, the learned Munsif was of opinion that the plaintiff was entitled to an enhancement of Rs. 36 and odd upon the present rental. The suit was, however, dismissed on the ground that a previous suit for enhancement had been dismissed for default under Order 9, rule 8 of the Code of Civil Procedure and the present suit was instituted within fifteen years of the dismissal of the previous suit.

* Appeal from Appellate Decree no. 767 of 1924, from a decision of H. R. Meredith, Esq., i.o.s., District Judge of Purnea, dated the 11th March, 1924, confirming a decision of Babu Atal Bihari Saran, Munsif of Katihar, dated the 10th May, 1923.

On appeal the learned District Judge was of the same opinion as regards the maintainability of the suit and he did not consider the question as regards the amount of enhancement to which the plaintiff was entitled. The previous suit was instituted on the 21st February, 1922 and it was dismissed for default on the 7th June, 1922. An application for rehearing under Order 9, rule 9 was also dismissed.

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The question is whether the dismissal of the previous suit under Order IX, rule 8, would debar the plaintiff from maintaining the present suit for enhancement of rent of the same tenure. Section 9 of the Bengal Tenancy Act provides that when the rent of a tenure holder has been enhanced by the Court or by contract, it shall not be again enhanced by the Court during the fifteen years next following the date on which it has been so enhanced. In the present case there has been no enhancement of rent either by the Court or by contract and therefore a fresh suit will not be barred. The learned District Judge has referred to the provisions of Order IX, rule 9, of the Code of Civil Procedure and has held that having regard to the fact that the previous suit was dismissed under rule 8 the plaintiff was precluded from bringing a fresh suit in respect of the same cause of action and he was of opinion that the cause of action in the previous suit was the same as the cause of action in the present suit. I am of opinion that the cause of action in the present suit cannot be considered to be the same as the cause of action in the previous suit. The learned Munsif observed that the cause of action in the previous suit was that the rent of the tenure had not been enhanced within the last fifteen years and in this suit also the cause of action is that the rent had not been enhanced within fifteen years; but he overlooked the fact that the period of fifteen years in the present suit is different from the period of fifteen years in the prior suit. Under section 37 of the Bengal Tenancy Act, the dismissal of a suit on merits would debar the plaintiff from

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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.

APPELLATE CIVIL.

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,

* 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.