

In my opinion the suit has been rightly decided by the learned Subordinate Judge and the appeal must be dismissed with costs.

JAMES, J.—I agree.

Appeal dismissed.

1930.

CHOUDEHURI
GOVINDA
CHANDRA
DAS

v.

HAYAGRIBA
UPADHAYA.

FAZL
ALI, J.

APPELLATE CIVIL.

Before James and Chatterjee, JJ.

PARMESHAR MISSIR

1930.

May, 6.

v.

DHORI AHIR.*

Bengal Tenancy Act, 1885 (Act VIII of 1885), section 37—enhancement of rent, suit for—application for withdrawal—plaintiff permitted to withdraw, subject to payment of costs with liberty to bring fresh suit—costs if not paid, suit to stand dismissed—costs not paid—second suit brought within 15 years—dismissal, whether on merits—section 37, whether a bar—Code of Civil Procedure, 1908 (Act V of 1908), Order XXIII, rule 1, whether applicable.

D brought a suit for enhancement of rent which he wished to withdraw on the 16th of August, 1927. The order of the trial court was that the suit might be withdrawn with permission to bring a fresh suit, if the defendant's costs were paid within fourteen days, but that if the costs should not be paid within that time, the suit should stand dismissed. The costs were not paid with the result that the suit stood dismissed on the 30th of August, 1927. In the meantime the plaintiff instituted the present suit on the 25th of August, 1927. The defendant contended that the suit having been instituted within fifteen years was barred under section 37, Bengal Tenancy Act, 1885.

* Appeal from Appellate Decree no. 1582 of 1928, from a decision of A. C. Davies, Esq., i.c.s., District Judge of Shahabad, dated the 17th September, 1928, reversing a decision of Babu Uma Kanta Prashad Sinha, Munsif of Sasaram, dated the 23rd December, 1927.

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PARNESHAR
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Held, that the dismissal of the suit was not "on the merits", and that, therefore, section 37, Bengal Tenancy Act, 1885, did not operate as a bar to the second suit.

Held, further, that the provisions of Order XXIII, rule 1, Code of Civil Procedure, 1908, did not apply.

Appeal by the plaintiffs.

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

Lachmi Narain Sinha, Sarjoo Prasad and Ram Nandan Prasad, for the appellant.

B. P. Sinha, for the respondent.

JAMES, J.—This appeal arises out of a suit for enhancement of rent, which was decreed by the Munsif of First Court, Sasaram, whose decision was reversed on appeal by the District Judge of Shahabad.

Early in 1927 the plaintiff instituted a suit for enhancement of the rent of the holding or a part of it, which he wished to withdraw on the 16th of August, 1927. The order of the Munsif was that the suit might be withdrawn, with permission to bring a fresh suit, if the defendant's costs were paid within fourteen days, but that if the costs should not be paid within that time the suit should stand dismissed. The costs were not paid with the result that the suit stood dismissed on the 30th August, 1927. In the meantime the suit with which we are now here concerned had been instituted on the 25th of August. The learned District Judge held that the order of the Munsif amounted to a dismissal of the suit on the merits and that section 37 of the Bengal Tenancy Act applied to bar the institution of another suit for enhancement within fifteen years.

Mr. Lachmi Narain Sinha on behalf of the appellant argues that the dismissal in August, 1927, was not in any sense a dismissal on the merits. It

is argued on behalf of the respondent that whether the dismissal was on the merits or not the provisions of Order XXIII, rule 1, Code of Civil Procedure, should be applied to bar a second suit based on the same cause of action. I do not consider that this is a case to which the provisions of Order XXIII, rule 1, should be held to apply. These provisions would have applied to the suit if the costs had been paid in time; but the order of the Court was not that the suit should be dismissed on the merits if the costs were not paid in time but merely that the suit should be dismissed; and the suit was accordingly dismissed for default. The learned District Judge indeed suggests that the suit was dismissed on the merits; but it does not appear to us possible to hold that the suit was dismissed otherwise than for default. There would be no meaning in the expression "on the merits" if a suit dismissed in this way, manifestly for default, were to be regarded as a suit dismissed on the merits. I would accordingly allow this appeal, set aside the order of the lower appellate Court and restore the order of the Munsif of Sasaram. The plaintiff will be entitled to his costs throughout.

CHATTERJEE, J.—I agree.

Appeal allowed.

APPELLATE CRIMINAL.

Before Fazl Ali and James, JJ.

BIHARI MAHTON

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 162 and 326—jurors, minimum number of, whether

* Criminal Appeal no. 6 of 1930, from a decision of F. G. Rowland, Esq., I.C.S., Sessions Judge of Patna, dated the 30th November, 1929.

1930.

PARMESHAR
MISSIR

v.
DHORI AHIR.

JAMES, J.

1930.

April, 4, 9,
10.

May, 13.