1936.

BALABUX MARWARI v. INDER KUMAR TEWARI.

should on proper accounting be ascribed to the deposits made by the plaintiffs themselves and how much to the deposits of Sheogobind that may be still outstanding.

In the result I would dismiss the appeal with costs.

ROWLAND, J. JAMES, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before James and Rowland, JJ.

1936.

August, 12.

MUSAMMAT BALKESIA

v.

MAHANT BHAGWAN GIR.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 9, *Order IX, rule* 4—*whether dismissal of an application under Order IX, rule* 4, *bars a fresh suit on the same cause of action.*

Order IX, rule 4, provides that the plaintiff may bring a suit or he may apply for setting aside the dismissal. If he satisfies the court and obtains an order setting aside the dismissal he proceeds with his original suit. If his application is dismissed he is left to his alternative remedy which is that he may, subject to the law of limitation, bring a fresh suit.

Bhudeo v. *Baikunthi*(1), *Tulshi Singh* v. *Sheosaran Rai*(2) and *Govind Prasad* v. *Har Kishan*(3), followed.

Per Rowland, J.—

Section 9 of the Code declares that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

*Appeal from Appellate Decree no. 1186 of 1933, from a decision of Rai Bahadur Surendra Nath Mukharji, District Judge of Patna, dated the 19th August, 1933, reversing a decision of Babu Rabindra Nath Ghosh, Subordinate Judge of Patna, dated the 30th March, 1932.

(1) (1921) 63 Ind. Cas. 239.

(2) (1926) A. I. R. (All.) 678.

(3) (1928) I. L. R. 50 All. 837.

A dismissal under rule 3 of Order IX does not operate to preclude the plaintiff from suing again even if rule 4 does not expressly save the right of suit. Rule 4 does not create, but declares the right of bringing a fresh suit, while at the same time permitting the plaintiff in the alternative to proceed with his original suit.

Appeal by the defendants.

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

Khurshaid Husnain and *S. N. Bose*, for the appellants.

B. N. Mitter and *B. Mukharji* for *B. K. Sinha*, for the respondents.

JAMES, J.—This is a second appeal from the decision of the District Judge of Patna decreeing the plaintiff's suit which was based on a mortgage bond of the 13th December, 1915.

The facts as found by the learned District Judge are as follows. On the 13th of December, 1915, Ramdhin Singh mortgaged certain property to Mahant Bhagwan Gir, the plaintiff of this suit, for Rs. 500. Ramdhin Singh subsequently took two more loans from the Mahant, who in order to obtain the money for the second loan, borrowed Rs. 400 from Ramdas Sahu, depositing with him the mortgage bond as some kind of security for repayment. The Mahant had already paid Rs. 200 to Ramdas Sahu, when on the 6th April, 1919, he went to pay him the balance. He was then told that one Sheo Prashad who had apparently represented himself as the agent of the Mahant, had paid to Ramdas Sahu the balance due to him, and had taken the mortgage deed. He subsequently discovered that the mortgage deed which had an endorsement of payment signed by Sheo Prasad was in possession of Bengala Singh who had purchased from Ramdhin Singh a portion of the mortgaged property. Thereupon the mahant instituted a suit on his mortgage bond, but owing to his failure to appear at an

1936.

MUSAMMAT BALKESIA v. MAHANT BHAGWAN GIR.

JAMES, J.

early stage of the suit it was dismissed under Order IX, rule 3, of the Code of Civil Procedure on the 10th of May, 1920. The mahant applied for restoration of the suit under Order IX, rule 4, but the application was dismissed after hearing. On the 9th of December, 1930, he instituted the present suit, which was in due course decreed by the District Judge of Patna on the findings of fact which have been stated above.

The appellants are three defendants of the suit, who on the 12th October, 1923, purchased a portion of the mortgaged property from Ramdhin Singh, defendant no. 1.

Mr. Khurshaid Husnain on behalf of the appellants argues, in the first place, that in dealing with the question of whether the mahant's mortgage debt has been satisfied, the learned District Judge has not applied the presumption which he is permitted to apply by illustration (*i*) of section 114 of the Indian Evidence Act. The learned District Judge has believed the mahant's evidence that the debt has not been satisfied and that he was unable to recover the mortgage bond from Ramdas Sahu; and since the learned District Judge has believed that evidence, there is no room for the application of a presumption that the bond has been satisfied because it is in possession of the mortgagor.

Mr. Khurshaid Husnain argues, in the second place, that the present suit should be regarded as barred by reason of the provisions of Order IX, rule 4. Order IX, rule 4, provides that where a suit is dismissed under rule 2 or rule 3, the plaintiff may bring a fresh suit; or he may apply for an order to set the dismissal aside. Mr. Khurshaid Husnain argues that these two provisions are mutually exclusive, so that if the plaintiff elects to avail himself of his right to apply to have the order of dismissal set aside, he is thereby precluded from availing himself of the right to institute a fresh suit. The only decisions in point

which have been brought to our notice by Mr. Khurshaid Husnain are adverse to this argument: *Bhudeo* v. *Baikunthi*(1) of Mr. Justice Stuart, *Tulshi Singh* v. *Sheosaran Rai*(2) of Mr. Justice Daniels, and *Govind Prasad* v. *Har Kishan*(3) of Mr. Justice Weir, all of the Allahabad High Court. In all these cases it has been held that the alternative provisions of rule 4 are not mutually exclusive, and that a plaintiff whose application for a restoration of his suit has been dismissed, is not precluded from instituting a fresh suit. I do not consider that any ground has been made out which would justify us in differing from the view expressed by the learned Judges whom I have named. It appears to us that a reasonable reading of the rule provides that the plaintiff may bring a fresh suit or he may apply for setting aside the dismissal. If he satisfies the Court and obtains an order setting aside the dismissal, he proceeds with his original suit. If having applied for an order to set aside the order of dismissal, he fails to satisfy the Court and his application is dismissed, he is left to his alternative remedy which is that he may, subject to the law of limitation, bring a fresh suit.

Mr. Khurshaid Husnain suggests, in the third place, that the present appellants should be regarded as *bona fide* transferees for value without notice, and that some kind of equitable right has accrued to them from the delay of the plaintiff in instituting the present suit. He instituted his suit on the mortgage bond; and it has not been proved that the plaintiff by any express words or action led these defendants to believe that his debt had been satisfied before they purchased the property. But it is suggested that the plaintiff in some way or other led them to that belief by holding aloof when he should at once have instituted a fresh suit after the failure of his application under Order IX, rule 4. This argument has been based on certain English equitable rules, but the law is clear

(1) (1921) 63 Ind. Cas. 239.
(2) (1926) A. I. R. (All.) 678.
(3) (1928) I. L. R. 50 All. 837.

1936.

MUSAMMAT BALKESIA v. MAHANT BHAGWAN GIR.

JAMES, J.

that no equity arises from mere delay to enforce a legal demand, and unless other circumstances create an equity, the only question which can arise from the delay is whether the legal demand is barred by the law of limitation or not: [*In re Maddever*(1)]. Nothing in the conduct of the plaintiff can be held to have conferred any kind of equitable right upon the appellants to resist the enforcement of the mortgage bond, and in my judgment this appeal should be dismissed with costs.

ROWLAND, J.—I agree.

With reference to the argument that the dismissal of a suit under Order IX, rule 3, of the Code of Civil Procedure may, coupled with the dismissal of an application for rehearing, operate to preclude the plaintiff from suing again on the same cause of action, I would like to add a few words. It seems to me that section 9 of the Code of Civil Procedure is fatal to the appellants' argument. This section declares that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. This is subject to such provisions as those of section 11 which bars suits on matters already judicially decided between the parties or of Order IX, rule 9, which precludes a plaintiff from suing again on the same cause of action where his suit has been dismissed under rule 8, that is to say on appearance of the defendant and in the absence of the plaintiff. In the absence of some such provision as that with which Order IX, rule 9, commences, a dismissal under Order IX, rule 3, would still, in my opinion, not operate to preclude the plaintiff from suing again even if Order IX, rule 4, did not expressly save his right of suit. Rule 4 in effect does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed

(1) (1884) 27 Ch. Div. 523.

1936.

MUSAMMAT BALKESIA v. MAHANT BHAGWAN GIR.

with his original suit. The former option the plaintiff has as of right; the other option is available to him only if he can satisfy the court that he had sufficient cause for the non-appearance or other default which led to the dismissal of the suit. On the other points I have nothing to add.

Appeal dismissed.

ROWLAND, J.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Dhavle, J.

1936.

August, 4, 5, 6, 7, 14.

JANKIRAM SITAL RAM FIRM

v.

THE CHOTA NAGPUR BANKING ASSOCIATION, LTD.*

Estoppel—mortgage by a co-sharer of certain properties as his own—attestation by his co-sharers after knowing the contents of the document—purchaser in execution of money decree, if bound by the mortgage sale.

Where a co-sharer mortgaged certain houses alleging it to be his self-acquisition and the other co-sharers stood by, and being aware of the contents, attested the same and the mortgagee on this representation advanced the loan and in execution of a decree on the basis of the mortgages purchased the mortgaged property, but was resisted at the time of delivery of possession by persons who claimed to have purchased in execution of a money decree against the co-sharers of the mortgagor and under a sale deed executed by them. The mortgagee brought the present suit in ejectment.

Held, that the attesting co-sharers and the purchasers of their interest were estopped from challenging the title of the mortgagee auction-purchaser.

Cairncross v. *Lorimer*(1), followed.
Jordan v. *Money*(2), distinguished.

*Appeal from Original Decree no. 201 of 1932 with Appeal from Original Decree no. 25 of 1933, from a decision of Babu Gajadhar Prasad, Subordinate Judge of Dhanbad, dated the 22nd September, 1932.

(1) (1860) 3 Macq. H. L. C. 829.
(2) (1854) 5 H. L. C. 185.