

(1936) 08 PAT CK 0007
In the Patna High Court

Mt. Balkesia and Others

APPELLANT

Vs

Mahant Bhagwan Gir and Others

RESPONDENT

Date of Decision : 12-08-1936

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 9
Evidence Act, 1872 — Section 114(i)

Citation : AIR 1937 Patna 9

Hon'ble Judges : Rowland, J;James, J

Bench : Full Bench

Judgement

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 13th December 1915. The facts as found by the learned District Judge are as follows: On 13th 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 6th April 1919, he went to pay him the balance. He was then told that one Sheoprasad, 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 Sheoprasad was in possession of Bengala Singh, who had purchased from Ramdhin Singh a portion of the mortgaged property. There upon the mahant instituted a suit on his mortgage-bond, but owing to his failure to appear at an early stage of the suit it was dismissed under Order 9, Rule 3, Civil P. C, on 10th May 1920. The mahant applied for restoration of the suit under Order 9, Rule 4, but the application was dismissed after hearing. On 9th 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.

2. The appellants are three defendants of the suit who on 12th October 1923 purchased a portion of the mortgaged property from Ramdhin Singh, defendant 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 illus. (i) of Section 114, 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 9, Rule 4. Order 9, 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 there by 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*, (1921) 63 IC 239 of Stuart, J., *Tulshi Singh and Another Vs. Sheosaran Rai and Others*, of Daniels, J., and *Govind Prasad Vs. Har Kishen and Others*, of Weir, J., 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 justifies 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.

3. 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 9, Rule 4. This argument has been based on certain English equitable rules, but the law is clear that no equity arises

from mere delay to enforce a legal demand, and unless other circumstance 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, (1884) 27 Ch D 523 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.

4. I agree, with reference to the argument that the dismissal of a suit under Order 9, Rule 3, Civil P.C. 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, Civil P. C, 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. That is subject to such provisions as those of Section 11 which bars suits on matters already judicially decided between the parties or of Order 9, 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 9, Rule 9 commences, a dismissal under Order 9, Rule 3 would still, in my opinion, not operate to preclude the plaintiff from suing again even if Order 9, 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 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.