1912
June, 8.

REVISIONAL CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

NAND RAM (APPLICANT) *v.* BHOPAL SINGH (OPPOSITE PARTY).*

Civil Procedure Code (1908), *section* 115—*Revision—Interlocutory order—Scope of section.*

Held by KARAMAT HUSAIN, J.—that an application under section 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by section 105, which provides that they may be made a ground of objection in appeal against the final decree. *Moti Lal Kashibhai* v. *Nana* (1) followed.

Inasmuch as an order under order IX, rule 13, setting aside an *ex parte* decree can be attacked in appeal from the final decree, no application will lie for revision of such an order. *Gopala Chetti* v. *Subbier* (2) followed.

The facts of this case were as follows:—

The plaintiff, in 1910, sued on a mortgage made by two joint brothers, Bhopal and Bahadur. Bhopal, his son Baddari, grandson Harnarain Singh, and nephew Sham Lal, were defendants. Baddari was appointed guardian *ad litem* of his minor son Harnarain, and notice was served upon him on the 14th of August, 1910. Bhopal signed it as a witness. Notice was not served on Bhopal personally, but the summons was affixed to the door of his house. The record does not show if this was deemed by the Munsif to be sufficient service. The suit was decreed on the 19th of December 1910. The decree against Bhopal was *ex parte*. An application for an order absolute was made on the 16th of July, 1911, and granted.

Bhopal, on the 1st of August, 1911, applied under order IX, rule 13, to have the *ex parte* decree set aside, stating in the affidavit that on the date on which the case was heard, he was in Allahabad. The Munsif, holding that there was sufficient reason for his absence, set aside the *ex parte* decree on the 18th of December, 1911, and made another decree at variance with the *ex parte* decree on the 13th of February, 1912.

The decree-holder, on the 19th of February, 1912, came to the High Court in revision against the order, dated the 18th of December, 1911, but never appealed against the decree, dated the 13th of February, 1912.

Mr. *A. E. Ryves*, for the applicant,

*Civil Revision No. 34 of 1912.

(1) (1892) I. L. R., 18 Bom., 35. (2) (1903) I. L. R., 26 Mad., 604.

Mr. *A. H. C. Hamilton* and Munshi *Benode Behari*, for the opposite party.

KARAMAT HUSAIN, J.—The plaintiff, in 1910, sued on a mortgage made by two joint brothers, Bhopal and Bahadur. Bhopal, his son Baddari, grandson Harnarain Singh, and nephew Sham Lal, were defendants. Baddari was appointed guardian *ad litem* of his minor son Harnarain, and notice was served upon him on the 14th of August, 1910. Bhopal signed it as a witness. Notice was not served on Bhopal personally, but the summons was affixed on the door of his house. The record does not show if this was deemed by the Munsif to be sufficient service. The suit was decreed on the 19th of December, 1910. The decree against Bhopal was *ex parte*. An application for an order absolute was made on the 16th of July, 1911, and granted.

Bhopal, on the 1st of August, 1911, applied under order IX, rule 13, to have the *ex parte* decree set aside, stating in the affidavit that on the date on which the case was heard, he was in Allahabad. The Munsif, holding that there was sufficient reason for absence, set aside the *ex parte* decree on the 18th of December, 1911, and made another decree at variance with the *ex parte* decree on the 13th of February, 1912.

The decree-holder, on the 19th of February, 1912, came to this court in revision against the order, dated the 18th of December, 1911, but never appealed against the decree, dated the 13th of February, 1912.

In support of the application it is argued that under order IX, rule 13, corresponding to section 108, Code of Civil Procedure of 1882, a court has power to set aside an *ex parte* decree "only when he (the applicant) satisfied the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the case was called on for hearing," and as no cause is alleged for absence and nothing on the record to show that summons was not duly served, the Munsif had no jurisdiction to set aside the *ex parte* decree. The reply of the learned counsel for the other side is that the remedy open to the applicant was to attack the order in appeal from the decree, dated the 13th of February, 1912, and as he allowed it to become final, he could not be heard in revision. He also urges that the result

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of interference would be to set aside a final decree. The contention that the Munsif acted without jurisdiction is not an accurate statement of what took place. He wrongly considered what was no cause to be a sufficient cause for absence, but did not act without jurisdiction. The order can, therefore, not be a fit subject for revision. Assuming that he acted with material irregularity, though not without jurisdiction, the remedy of the applicant was to attack the order in appeal from the decree of the 13th of February, 1912, under section 105, Code of Civil Procedure, and as he failed to appeal, he cannot be allowed to come up in revision. In *Farid Ahmad* v. *Dulari Bibi* (1) it was held that an order made under section 25, Code of Civil Procedure, transferring a suit in which an appeal would lie from the decree made therein was not subject to revision by the High Court under section 622. In *Sheo Prasad Singh* v. *Kastura Kuar* (2) it was remarked that the revisional powers of this court should not be exercised unless as a last resort for an aggrieved litigant. Even when there is a remedy by a fresh suit, there can be no revision. See *J. J. Guise* v. *Jaisraj* (3). Regarding this case, KNOX, J., in *Debi Das* v. *Ejaz Husain* (4) said :—"Ordinarily I am prepared to subscribe to that, but in this matter each case must be judged upon the circumstances peculiar to it."

I adopt the following remarks in *Moti Lal Kashibhai* v. *Nana* (5) substituting section 115 for section 622 and section 105 for section 591 :—"An application under section 622 cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by section 591, which provides that they may be made a ground of objection in the appeal against final decree. The purpose with which section 622 was passed was to enable a party to a suit to get rid of a decision or order of a lower court rectified by the High Court where there would otherwise be no remedy."

There is, however, a conflict of opinion as to whether an order setting aside an *ex parte* decree is or is not attackable in appeal from a final decree. A Bench of the Calcutta High Court held that it is not, and that only such orders are within the purview of the

(1) (1884) I. L. R., 6 All., 233.
(2) (1889) I. L. R., 10 All., 119.
(3) (1893) I. L. R., 15 All., 405.
(4) (1905) I. L. R., 28 All., 72.
(5) (1892) I. L. R., 18 Bom., 35.

section as are "affecting the decision of the case" *with reference to its merits: Chintamony Dassi* v. *Raghoonath Sahoo* (1) and *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (2). According to that court the order can be reversed under section 622, Code of Civil Procedure of 1882—section 115, Code of Civil Procedure of 1908—if the requirements of the section are satisfied, *Mahomed Hamidulla* v. *Tohurennissa Bibi* (3). A Bench of the Madras High Court in *Gopala Chetti* v. *Subbier* (4) has taken the opposite view, holding that an order setting aside an *ex parte* decree could be attacked in appeal from the final decree. With due respect to the learned Judges who decided the cases reported in I. L. R., 22 Calc., 981 and 9 C. W. N., 584, I agree with the learned Judges who decided the case I. L. R., 26 Mad., 604. There were no words in section 622, Code of Civil Procedure of 1882, nor are there any in section 115, Code of Civil Procedure of 1908, limiting the right of attack to such orders only as are "affecting the decision of the case" *with reference to its merits*, and in the absence of any such limitation a court has no power to read such a limitation into the section.

The contention that in order to destroy the right to apply for revision, some other remedy must exist on the date on which the order sought to be revised is made has no force. All interlocutory orders, which can be attacked in appeals from final decrees under section 105, are always passed before the final decree, and if the contention was right, all orders which might be attacked in appeal from the final decree, would furnish grounds for applications in revision, and the object for which the section is enacted would be defeated.

For the above reasons I would reject the application.

KNOX, J.—I agree in rejecting the application. Sufficient ground has not been shown for interference.

BY THE COURT.—The application is rejected with costs.

Application rejected.

(1) (1895) I. L. R., 22 Calc., 981. (3) (1897) I. L. R., 25 Calc., 155.
(2) (1905) 9 C. W. N., 584. (4) (1903) I. L. R., 26 Mad., 604.