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the defendants first party on the record under Order XLI, rule 20.

I would, therefore, set aside the order of dismissal of the suit against defendants first party and send back the record of this case to the lower appellate Court who may add them as parties under Order XLI, rule 20, and the defendants first party will be entitled to file a cross-objection provided they pay the proper court-fee within time and then the matter may be disposed of in accordance with law so far as the defendants first party are concerned. If no cross-objection is presented within time it will be the duty of the lower appellate Court to affirm that part of the decree of the Munsif by which the defendants first party are directed to pay Rs. 800 to the plaintiff. The appeal, however, as against the defendants second party will stand dismissed because we have held that the suit is premature inasmuch as the mahant was alive at the time the suit was instituted. The defendants second party are entitled to their costs of this second appeal. The defendants first party are entitled to the costs actually incurred by them in this Court.

VARMA, J.

ROWLAND, J.—I agree.

K. D.

Appeal allowed in part.
Case remanded.

APPELLATE CIVIL.

Before Rowland and Chatterji, JJ.

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August, 23, 24.

HARBALLAV PRASAD CHOWDHURY

v.

JAGBALLAV PRASAD CHOWDHURY.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLIII, rule* 1(*w*), *and Order XLVII, rules* 4(1) *and* 7—

* Appeal from Original Order no. 142 of 1937, from an order of Babu Nand Kishore Chaudhuri, Subordinate Judge at Darbhanga, dated the 5th March, 1937.

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right of appeal, whether restricted by the grounds set out in rule 7 of Order XLVII—rule 4(1), meaning and scope of.

The right of appeal granted by Order XLIII, rule 1(*w*), Code of Civil Procedure, 1908, is subject to, and restricted by, the grounds set out in Order XLVII, rule 7, of the Code.

Jadunandan Singh v. *Shankar Sahu*(1) and *Sunder Mall* v. *Upendra Nath Seal*(2), followed.

Daso Keshav Panchbhavi v. *Karbasappa Kariyappa Mudhol*(3) and *Mukundsa* v. *Motiram*(4), not followed.

Order XLVII, rule 4(*1*), of the Code, cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review.

Appeal by the plaintiffs.

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

B. N. Mitter (with him *R. Chowdhury* and *Ajit K. Mitter*), for the appellants.

Bhabananda Mukharji, for the respondents.

CHATTERJI, J.—This appeal arises out of proceedings in a partition suit instituted so far back as in the year 1917. Without going into the long history of the case, it will be enough to state that in pursuance of the preliminary decree which was passed in 1919, a commissioner was appointed who eventually submitted his report on the 26th April, 1935. According to his findings, the plaintiffs were entitled to get various sums from the defendant who was the karta of the joint family. The defendant filed objections to the report and those were disposed of by the Subordinate Judge by his order dated the 17th January, 1936. Accepting the commissioner's report in part, he passed a final decree. Before the

(1) (1936) 17 Pat. L. T. 766.
(2) (1916) 1 Pat. L. J. 193.
(3) (1926) A. I. R. (Bom.) 121.
(4) (1928) 116 Ind. Cas. 645.

final decree was actually prepared the defendant made an application on the 17th February, 1936, for review of the judgment dated the 17th January, 1936. In the application certain items in the commissioner's report were specifically referred to and it was prayed that

"those items should be reconsidered with a view to rectify the mistakes and inequities that have crept in owing to a misapprehension."

This application was presented to and heard by the same Judge who passed the final decree on the 17th January, 1936. He granted the application by his order dated the 5th March, 1937, and by the same order he passed a fresh final decree. The present miscellaneous appeal is directed against that order in so far as it granted the application for review.

The substantial point urged in this appeal is that there were no sufficient grounds upon which the learned Subordinate Judge could review the final decree which was passed on the 17th January, 1936. In support of his contention Mr. Mitter has relied upon the decision of the Privy Council in *Chhajju Ram* v. *Neki*(1) where their Lordships laid down that "any other sufficient reason" in Order XLVII, rule 1. of the Code of Civil Procedure, means a reason sufficient on grounds at least analogous to those specified immediately previously. In the present case, however, the learned Subordinate Judge has held that there was an error apparent on the face of the record or something analogous to it. If that is so, certainly the review was permissible under the express provisions of Order XLVII, rule 1. But let us assume that the Subordinate Judge was wrong in his view of the facts with which he was dealing. The question is whether in this appeal we can examine the propriety of his decision. Indeed under Order XLIII, rule 1(*w*), an order granting an application for review is appealable; but Order XLVII,

(1) (1922) I. L. R. 3 Lah. 127, P. C.

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rule 7, specifies certain limits within which such an appeal can be entertained. The relevant portion of Order XLVII, rule 7, runs as follows :—

" (1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

(a) in contravention of the provisions of rule 2,

(b) in contravention of the provisions of rule 4, or

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit."

Thus it is clear that an order granting an application for review can be objected to only upon the three grounds specified in the above rule and no other. Now in the present case the first and the third grounds unquestionably do not exist. An attempt was made by Mr. Mitter to support the appeal on the second ground, namely, that the application was in contravention of the provisions of rule 4. That rule runs as follows :—

" (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same:

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

Sub-rule (1) does not obviously apply as it refers to a case where the Court rejects the application. It cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review.

Whether there is no such ground must appear to the Court which hears the application. If the Court considers that the application should be granted the case falls under sub-rule (2). Mr. Mitter wanted to rely on proviso (*b*) of that sub-rule, but the application was not based on the ground of discovery of any new matter or evidence nor was it granted on any such ground. The position, therefore, is that none of the grounds on which the order granting the application for review could be attacked by way of appeal exists in the present case.

Mr. Mitter has referred us to a decision of the Bombay High Court in *Daso Keshav Panchbhavi* v. *Karbasappa Kariyappa Mudhol*(1) and to the decision of the Nagpur Court in *Mukundsa* v. *Motiram*(2). In both these cases it was no doubt held that the right of appeal granted by Order XLIII, rule 1(*w*), is not restricted by the grounds set out in Order XLVII, rule 7. But there are decisions of this Court on this point in *Jadunandan Singh* v. *Shankar Sahu*(3) and *Sunder Mall* v. *Upendra Nath Seal*(4). In the latter case, though it was a decision of a single Judge, it was held that an appeal under Order XLIII, rule 1(*w*), is subject to the provisions of Order XLVII, rule 7. It was further held that an order granting a review merely for sufficient ground is not appealable. In the case of *Jadunandan Singh* v. *Shankar Sahu*(3) a Division Bench of this Court held that when a review is granted an appeal is permissible only on the grounds specified in Order XLVII, rule 7. The High Courts of Calcutta, Rangoon and Lahore have also taken the same view as this Court. This being the state of the authorities on the point, I am afraid we are unable to follow the decisions of the Bombay High Court and the

(1) (1926) A. I. R. (Bom.) 121.
(2) (1928) 116 Ind. Cas. 645.
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Nagpur Court referred to. It is to be observed that the Bombay High Court subsequent to its aforesaid decision deleted Order XLIII, rule 1(*w*), by virtue of its rule-making power.

Mr. Mitter further contends that the order now under appeal being the final judgment in the suit, it may be attacked on grounds other than those specified in Order XLVII, rule 7. The answer to this is that this is not a regular appeal against the final decree but a miscellaneous appeal from the order granting the application for review and it cannot be treated as a regular appeal in view of the fact that the question of court-fee would arise. Mr. Mitter has asked us to treat the appeal as a regular appeal on payment of the deficit court-fee; but it is now too late to accede to that prayer. The appeal was presented on the 19th July, 1937, and was not properly constituted as a regular appeal, being insufficiently stamped. There is no justification for converting it into a regular appeal so long after the expiration of the prescribed period of limitation.

Mr. Mitter lastly asked us to treat the memorandum of appeal as an application in revision as was done in *Sikandar Khan* v. *Baland Khan*(1). Under section 115 of the Code of Civil Procedure revision is permissible only where the order complained of is not appealable. In the present case the order sought to be revised amounts to a final decree and as such is appealable. Consequently section 115 cannot come in. In the Lahore case where the facts were quite peculiar there was no such appealable decree or order.

I would dismiss the appeal but in the circumstances the parties should bear their own costs.

ROWLAND, J.—I agree.

S.A.K. *Appeal dismissed.*

(1) (1927) I. L. R. 8 Lah. 617.