evidence in regard to the legality of the warrant before acting upon it there would have been an express provision to that effect as there is in the case of proceedings under sections 3, 4 and 10. It is unnecessary to discuss the various authorities which have been cited before me as section 7 itself is perfectly clear. I dismiss the application.

N. F. E.

Revision dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Campbell.

PIROJ SHAH AND COMPANY (PLAINTIFF) Petitioner

versus

QARIB SHAH (DEFENDANT) Respondent.

1925

Dec. 8.

Civil Revision No. 429 of 1925.

Revision (Civil)—from order setting aside on ex parte *decree on a time-barred application—Civil Procedure Code, Act V of 1908, section 115—Punjab Courts Act, VI of 1918, section 44—Limitation for application* — onus probandi— *Indian Limitation Act, IX of 1908, section 3, article 164.*

On the 28th February 1924 the plaintiff-petitioner obtained an *ex parte* decree; on 18th April 1924 the defendant-respondent applied to have the decree set aside, alleging that he had no knowledge of the suit and on 16th October 1924, the Subordinate Judge passed an order that it would be set aside on security being furnished. On the point of limitation the Subordinate Judge held that, although the defendant was aware of the institution of the suit, there was nothing to shew on what date he had knowledge of the decree. On 27th May 1925 the security bond was accepted and the defendant directed to put in his pleas. The plaintiff then applied to the High Court for revision of the order setting aside the *ex parte* decree.

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Held, that under section 115 of the Code of Civil Procedure an order setting aside an *ex parte* decree is open to revision.

Lal Chand-Mangal Sen v. *Behari Lal-Mehr Chand* (1), distinguished.

Held also, that since the application was presented more than 30 days after the date of the decree the *onus* lay upon the defendant of proving, for the purposes of article 164 of the Limitation Act, that it was presented within 30 days of his having knowledge of the decree, and, when the Subordinate Judge, while holding that there was nothing to shew on what date the defendant had knowledge of the decree, granted the application, he assumed jurisdiction illegally.

Held further, that such a case calls for the interference of the High Court on revision.

Sungru Mal-Harcharan Das v. *Sham Lal-Gokal Chand* (2), and *Dittu Ram* v. *Nawab* (3), referred to.

Application for revision of the order of Lala *Suraj Narain, Senior Subordinate Judge, Lahore, dated the 16th October 1924, setting aside the* ex parte *decree.*

TEK CHAND, for Petitioner.

SAGAR CHAND and NUR-UD-DIN, for Respondent.

JUDGMENT.

CAMPBELL J.—The firm of Piroj Shah and Company, Bombay, instituted a suit against *Mian* Qarib Shah, a resident of the Peshawar District, in the Court of the Senior Subordinate Judge, Lahore and an *ex parte* decree was passed on the 28th of February 1924. On the 18th of April 1924 the defendant applied for the *ex parte* decree being set aside and by order, dated the 16th of October 1924, *Lala* Suraj Narain, Senior Subordinate Judge, directed that the *ex parte* decree would be set aside upon the defendant furnishing se-

(1) (1924) I. L. R. 5 Lah. 288 (F.B.). (2) (1918) 46 I. C. 777.
(3) (1925) 7 Lah. L. J. 448.

curity to the amount of at least Rs. 50,000 for satisfaction of the decree and the defendant was given a month's time in which to furnish security, in default his application was to stand dismissed with costs. The defendant's allegation was that he had had no knowledge of the suit. The learned Senior Subordinate Judge on the question of limitation wrote as follows :—

" On the question of limitation I cannot reject the plaintiff's contention. I am perfectly convinced that the defendant was not quite ignorant of the institution of the suit. Summonses went to his place several times. His son a *Mukhtar-i-am* refused to accept service. The son must have kept the father informed about all the proceedings.

" But there is nothing to show on what date the defendant had knowledge of the decree. He might have as well got the first notice of the decree on receipt of the letter, dated 5th April 1924, from the plaintiff's Vakil. His application, dated 18th April 1924, is thus within time. There is ground for setting aside of the *ex parte* decree."

The defendant applied unsuccessfully for review of the order of the 16th of October 1924, and eventually a security bond, dated the 1st of May 1925, by two persons Usman Ullah and Zain-ul-Ab-i-din, was produced by the defendant. It was sent for verification to the Collector, Peshawar, and the Court requested that the plaintiff's counsel should be given an opportunity of appearing at the verification proceedings. This was not done and the bond was sent back with the Tahsildar's report. It came before *Mehta* Dwarka Nath, Senior Subordinate Judge, who had succeeded *Lala* Suraj Narain, on the 27th of May 1925 and he ordered that in spite of the fact that the

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plaintiff had not had an opportunity of being represented in the verification proceedings, nevertheless the case should not be prolonged further. The security bond was accepted and the defendant was directed to put in his pleas on the 16th of June 1925. The plaintiff protested by means of a review application that the security bond did not fulfil the necessary conditions on which the decree was to be set aside and, on dismissal of this application, has come here for revision of the order setting aside the *ex parte* decree.

The objections raised are, firstly, that *Lala* Suraj Narain had no jurisdiction to set aside the *ex parte* decree upon a time-barred application, and, secondly, that the security bond should not have been accepted because it did not create any valid charge on the property purporting to be given in security, because it was not registered, and because the plaintiff had had no opportunity of being present at the verification. On the second point I do not understand Mr. Tek Chand, who appears for the plaintiff-petitioner, to contend that section 115 of the Code of Civil Procedure is applicable and he asks that section 107 of the Government of India Act be utilised.

Whether this section is in fact intended to permit interference by a High Court with orders passed judicially, which are secured from appeal or revision by the Code of Civil Procedure, is one into which I need not enter, for I do not consider the case to be one of a nature or importance to justify the exercise of extraordinary powers. I deal with the case merely with reference to the terms of section 115 of the Code of Civil Procedure.

The learned counsel for the respondent has objected that there can be no interference under this section, firstly, because the order in question was not made in a case decided, and, secondly, because, if

wrong, it was merely erroneous in law and, being not open to appeal, could not be attacked in revision.

As to the first point, reliance is placed on the Full Bench decision of this Court—*Lal Chand-Mangal Sen* v. *Behari Lal-Mehr Chand* (1)—where it was held that an interlocutory order does not constitute a case within the meaning of section 115 of the Code of Civil Procedure. In that decision the learned Chief Justice's judgment pointed out that, while every suit is a case, it cannot be said that every case is a suit, and expressed the opinion that a branch of a suit could not be regarded as a case within the meaning of section 115. I understand Mr. Sagar Chand for the respondent to argue that proceedings consequent on an application for setting aside a decree *ex parte* are merely a branch of a suit. I cannot agree. The suit is terminated when the *ex parte* decree is passed and it does not revive, if at all, until after the proceedings on the application are terminated. There is no suit pending either when the application is presented or when the order disposing of it is passed, and the proceedings, in my opinion, since they involve the reversal of a final order and decree in a suit are in themselves a case.

As regards the second contention of the respondent there is ample authority that a High Court will not exercise its powers of revision when the Court below has merely come to a wrong decision upon a point of law; but here the passage quoted above from *Lala* Suraj Narain's judgment makes it obvious that there is something much more than a mere erroneous decision of law. When a defendant comes forward with an application for setting aside an *ex parte* decree more than thirty days after the date of the

(1) (1924) I. L. R. 5 Lah. 288 (F.B.).

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decree, the *onus* lies on him of proving, for the purposes of Article 164 of the Limitation Act, that his application is presented within thirty days of his having knowledge of the decree, and the *onus* lies upon him more heavily when, as in the present case, it is found that he was perfectly well aware of the progress of the suit. *Lala* Suraj Narain cannot be presumed to have been ignorant of the law on this point. He says distinctly that there is nothing to show on what date the defendant had knowledge of the decree, yet he granted the application. The sentences following the sentence about knowledge to my mind are quite meaningless and I cannot conjecture what the learned Senior Subordinate Judge was thinking of. He has not decided erroneously that the *onus* was on the plaintiff to show when the defendant had knowledge of the decree, and he has not come to a definite finding that the defendant's first knowledge of the decree was obtained from the letter, dated the 5th of April 1924, for the words " he might as well have got " cannot be supposed to mean " he got ", particularly in view of the preceding sentence.

If there is to be any meaning or authority in section 3 of the Limitation Act, this is a case of illegal assumption of jurisdiction by the learned Senior Subordinate Judge in granting in favour of the applicant a prayer contained in a time-barred application for which the law did not permit him to extend time, and one which requires the interference of this Court under section 115 of the Code of Civil Procedure. There was similar interference in a much weaker case by Wilberforce J. in *Sungru Mal-Harcharan Das* v. *Sham Lal-Gokal Chand* (1), where a lower appellate Court had reversed an order dismissing a time-barred

(1) (1918) 46 I. C. 777.

application to set aside a decree *ex parte*. The lower appellate Court had held that it was for the plaintiff to show that the defendant had knowledge of the *ex parte* decree and that he had failed to do so, and the order of the first Court was restored by this Court in revision.

Subsequent to the delivery of the Full Bench decision cited above—*Lal Chand-Mangal Sen* v. *Behari Lal-Mehr Chand* (1)—the learned Chief Justice in *Dittu Ram* v. *Nawab* (2), interfered on revision where a Subordinate Judge had granted an application for setting aside an *ex parte* decree without considering the question whether the application was or was not barred by time.

I accept the application with costs and set aside the order restoring the suit.

C. H. O.

Revision accepted.

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(1) (1924) I. L. R. 5 Lah. 288 (F.B.). (2) (1925) 7 Lah. L. J. 448.