

possession against the plaintiff mortgagor who seeks to redeem. Whether they have done so or not is primarily a question of fact. It has been found by the lower appellate Court that they have not established a title by adverse possession other than a title to be redeemed. Nothing has been said to us in argument in this appeal to lead us to suppose that the lower appellate Court made any mistake of law in arriving at this conclusion. I agree, therefore, that this appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

BAI RAMI, DAUGHTER OF HANSJI BHANA (ORIGINAL DEFENDANT No. 6)
 PETITIONERS *v.* JAGA DULLABH AND OTHERS (ORIGINAL PLAINTIFFS),
 OPPONENTS.^a

1919.

December 5.

*Civil Procedure Code (Act V of 1908), section 115—Interlocutory order—
 High Court has no power to call for record.*

Under section 115 of the Civil Procedure Code, 1908, the High Court might call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto; but it has no power to call for the record of any case which is under trial by a Court subordinate to the High Court.

CIVIL Extraordinary application under section 115, Civil Procedure Code, 1908, praying that the order of the Subordinate Judge of Bulsar in Suit No. 308 of 1918, be set aside.

One Jaga Dulabh and others filed a Suit No. 308 of 1918, to recover possession against the petitioner (defendant No. 6) and others.

^a Civil Application No. 105 of 1919 under Extraordinary Jurisdiction.

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The petitioner was served with a summons to appear on the 18th October 1918, but owing to illness she could not appear and on the same date the Court made an order that the suit should be proceeded with *ex-parte* against the petitioner.

The case was heard on the 8th and 12th December 1918 and it was adjourned for the examination of the parties to the 12th January 1919. On the latter date the petitioner appeared and made an application to the Court praying for leave to put in a written statement and to defend the suit by leading evidence on her behalf.

The Subordinate Judge rejected the application and refused to set aside the previous order of the 18th October 1918, observing that the petitioner was not justified in being absent for more than five months after she was served with a summons.

The petitioner applied to the High Court.

M. K. Thakor, for the petitioner.

G. N. Thakor, for the opponents.

MACLEOD, C. J. :—This is an application by the 6th defendant in the suit asking us to exercise our powers under section 115 of the Civil Procedure Code. The facts are shown in the judgment of the Subordinate Judge, dated the 25th January 1919 :—

“The applicant was served with summons on 3rd August 1918 ; she had to be present on the 18th October ; she remained absent on the said date as well as on two following dates, namely, 8th November and 12th December. On 13th January she presented this application praying the Court to set aside the order to proceed with the suit *ex-parte* against her passed on 18th October.”

The Judge said :—

“The application was opposed by the plaintiff ; after carefully considering applicant's affidavit I am not satisfied that she was justified in being absent for about more than five months after she was served with a summons. Conceding that she was ill on 18th October, she ought to have moved the Court

as soon as she was cured; not having chosen to do so, she is not entitled to any indulgence in the matter, and so I reject her application with costs."

That was an interlocutory order which, whether it was right or whether it was wrong, does not decide the case. Under section 115 the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. We have, therefore, no power to call for the record of any case which is under trial by a Court subordinate to the High Court. It seems necessary to point out that an application like this made during the course of a trial asking the Court to exercise its powers under section 115 in the matter of interlocutory orders cannot be countenanced. If such applications are made in future they should not be admitted. The Rule is discharged with costs.

HEATON, J.:—I entirely agree. It seems to me that if there is one kind of case which section 115 most emphatically points to as not falling within its terms, it is a case like the present, where there is an interlocutory order on an incidental matter which does not prevent the further progress of the suit. How that can be brought within the words "a decided case in which no appeal lies" I myself am unable to understand.

Rule discharged.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

TRIMBAK GANESH KARMARKAR AND ANOTHER (ORIGINAL DEFENDANTS Nos. 1 AND 2), APPELLANTS *v.* PANDURANG GHARAJEE SHETTYE, (ORIGINAL PLAINTIFF), RESPONDENT*.

Hindu Law—Joint family—Sale of his share by a coparcener—Suit by purchaser for partition and for past mesne profits—Past profits cannot be allowed.

* Second Appeal No. 958 of 1918.

1919.

BAI RAMI
v.
JAGA
DULLABI.

1919.

December 11.