account under section 12 from Shamdin, the appellant is entitled to a decree for such amount, if any, actually found due. I agree, therefore, with the order proposed by my learned brother.

*Appeal allowed.*

R. R.

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.*

MAHADEO GOVIND WADKAR (HEIR OF ORIGINAL DEFENDANT No. 7), APPLICANT *v.* LAKSHMINARAYAN RAMRATAN MARWADI (ORIGINAL PLAINTIFF), OPPONENT*.

1925. *June* 26.

*Civil Procedure Code (Act V of 1908), Order IX, Rules 8, 9; Order XLVII, Rule 1—Suit—Dismissal for default—Application for restoring the suit to file—Delay in making application—Excuse of delay—Revision application—Grounds for review.*

When a suit has been dismissed for default under Order IX, Rule 8, of the Civil Procedure Code, the only remedy open to the plaintiff is to apply under Rule 9 in order to set aside the order of dismissal. It is not permissible to him to apply for a review of the order under Order XLVII, Rule 1, of the Code.

*Chhajju Ram* v. *Neki*[1], followed.

THIS was an application under the civil extraordinary jurisdiction of the High Court against an order passed by A. R. Gupte, Subordinate Judge at Mahad.

The plaintiff had filed a suit in the Court of the Subordinate Judge at Mahad; but it was dismissed for default on October 30, 1922.

On November 30, 1922, the plaintiff applied to the Court for restoration of the suit to the file. The opponents contended that the application was made one day too late and that the delay could not be excused.

* Civil Extraordinary Application No. 229 of 1924.

(1) (1922) L. R. 49 I. A. 144 : 3 Lah. 127.

1925.

MAHADEO GOVIND v. LAKSHMI-NARAYAN.

The trial Judge excused the delay, accepted the application and ordered the suit to be restored to the file.

The heir of original defendant No. 7 applied to the High Court.

*V. B. Virkar*, for the petitioner.

No appearance for the opponent.

MACLEOD, C. J.:—This is an application under section 115, Civil Procedure Code. The opponent having filed Suit No. 139 of 1921 in the Court of the Second Class Subordinate Judge at Mahad, the suit was dismissed for default under Order IX, Rule 8, Civil Procedure Code, on October 30, 1922. He was then entitled under Rule 9 to apply for an order to set the dismissal aside, and if he could satisfy the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court could make an order setting aside the dismissal. But under Article 163 of the Indian Limitation Act, the period of limitation for making such an application under Rule 9 is thirty days. The opponent made his application on the 31st day, and was therefore clearly out of time. Section 5 of the Indian Limitation Act has not been made applicable by any enactment or rule to an application under Order IX, Rule 9, and, therefore, the Court had no jurisdiction to admit the application on the ground that the opponent had sufficient cause for not preferring his application within the time prescribed. The Judge, however, said :—

"The question is whether the delay can be excused within the Court's discretion. The applicant is not to be blamed for sending the papers duly signed to his friend who was in business here. There is no negligence attributable to him on that score. If the mistake arose it arose with the mistaken view of that friend and hence I think the delay of one day should be excused properly in this case. Justice requires the exercise of discretion in that direction. To do otherwise would be clearly technical. Further, if I were not to excuse the delay there is nothing to prevent me from treating these two applications as for review and in that case they are clearly in time.

When a case is dismissed purely for a default the plaintiff has two remedies generally, viz., one to apply to have the suit restored to file and the other is by way of review. The second course is clearly open to the plaintiff and the Court, and hence I do not think that in the present application the delay of one day should not be excused. I excuse the delay and I hold the application to be in time."

That argument discloses an unfortunate confusion of thought. If the Judge had said "I treat this application as one for review, and therefore, pass an order setting aside the order of dismissal", then it is possible he might have been justified in making such an order. But he treated the application as one made under Order IX, Rule 9, and excused the delay which he had no power to do. If as a matter of fact the opponent was entitled to apply for a review, we might not have been inclined to interfere with the decision of the Judge. But since the decision of the Privy Council in *Chhajju Ram* v. *Neki*[1], we must take it that a plaintiff whose suit has been dismissed for want of appearance under Order IX, Rule 8, has no remedy by way of review, because the grounds on which a review can be granted are specified in Order XLVII, Rule 1. The words "any other sufficient reason" in sub-section (*1*) mean a reason sufficient on grounds at least analogous to those specified in the rule. Now the grounds specified in the rule are as follows:—The discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the party's knowledge, or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record. The fact that the opponent was absent when the suit was called on, would not be a ground for review specified in Order XLVII, Rule 1, sub-rule (*1*), nor could it be a ground analogous to any of those specified in the rule.

[1] (1922) L. R. 49 I. A. 144 ; 3 Lah. 127.

1925.

MARADEO GOVIND v. LAKSHMI-NARAYAN.

It seems to us, therefore, that the only remedy open to a party whose suit has been dismissed for default under Order IX, Rule 8, is to apply under Rule 9 to set aside the order of dismissal, and it is no longer open to him to apply for a review of the order under Order XLVII, Rule 1. That being our opinion, it was not open to the Subordinate Judge to entertain an application for review from the opponent, and as he had no power under the Indian Limitation Act to excuse the delay he ought to have dismissed the application. We must, therefore, make the Rule absolute with costs.

*Rule made absolute.*

R. R.

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.*

1925. *July* 1.

VIDYAVARDHAK SANGH COMPANY AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* AYYAPPA BIN SANGIRIMALLAPPA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS*.

*Landlord and tenant—Disclaimer of landlord's title—Forfeiture of tenancy—Bombay Land Revenue Code (Bombay Act V of 1879), section 84†.*

The denial of the landlord's title by a tenant who holds under section 84 of the Bombay Land Revenue Code and who is not governed by the Transfer of Property Act, works a forfeiture of the tenancy. Such a tenant can be sued in ejectment without a formal notice to quit.

*Venkaji Krishna Nadkarni* v. *Lakshman Devji Kandar*(1), followed.

*Rama Ranchhod* v. *Sayad Abdul Rahim*(2), explained.

* Second Appeal No. 455 of 1924.

† The material portion of the section runs as follows:—

"An annual tenancy shall...require for its termination a notice given in writing by the landlord to the tenant, or by the tenant to the landlord, at least three months before the end of the year of tenancy at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of Schedule E, or to the like effect."

(1) (1895) 20 Bom. 354.

(2) (1920) 45 Bom. 303.