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Under the circumstances last supposed, the sale should only be set aside on condition that Jamni pay to the plaintiff within a limited time, if not the entire purchase-money, at least the amount which she ought to have paid to her husband's creditor, the decree-holder.

Decree reversed and case remanded.

April 17.

Miscellaneous Special Appeal No. 36 of 1870.

KESHAVRA'M valad HIRA'CHAND *et al.* ... *Appellants.*

RA'MCHANDRA TRIMBAK *et al.* *Respondents.*

Ex parte Judgment—Setting aside ex parte Judgment—Time for making Application—Process for enforcing Judgment—Appeal—Civ. Proc. Code, Sec. 119.

A Judge has no jurisdiction to grant an application, made by a defendant against whom an *ex parte* judgment has been passed, to set aside the judgment after the expiration of the thirty days allowed, by Sec. 119 of the Code of Civil Procedure, for making such applications.

Such an application must be made within thirty days after the *first* process for enforcing the judgment against such defendant has been executed.

Though an order passed for setting aside a judgment is, on the merits of the application, final, yet where a Civil Court makes an order setting aside an *ex parte* judgment on an application presented after the period allowed by law has elapsed, an appeal against that order will lie, on the ground that it has been made without jurisdiction.

THIS was a special appeal from the decision of A. Bosanquet, Acting District Judge at Ahmednagar, in Appeal Suit No. 145 of 1870, confirming the decision of the Subordinate Judge of Nivásá.

The plaintiffs, Keshavrám and Maganrám, on the 22nd of June 1868, obtained, in the Court of the Subordinate Judge of Karád, a decree against the defendants, Rámchandra and Náráyan, directing that the land the subject-matter of the suit (which had been mortgaged to the plaintiffs) should be delivered into their possession, and that the defendants should be at liberty to redeem it within a year from the date of the decree, on payment of Rs. 1,600 with interest.

In pursuance of this decree the plaintiffs obtained possession of the property on or before the 24th August 1868. On the 17th of March 1870 the defendant Rámchandra applied to the Court of the Subordinate Judge of Nivásá to set aside the judgment passed by the Subordinate Judge of Karád, on the ground that he (the defendant) had not been served personally with the summons, and that he was not aware of the institution of the suit until his return home, about a month and a half before he presented his petition. The summons had been posted on the door of the defendant's house. The defendant's brother had appeared at the hearing and defended the suit. The Subordinate Judge of Nivásá admitted the application.

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The plaintiffs appealed from this order to the Acting District Judge at Ahmednagar, who confirmed the order of the Subordinate Judge with costs, for the following reasons :

“ The point for decision is whether this petition is barred by the law of limitation. This depends on whether the petitioner presented his petition, under Sec. 119 of the Civil Procedure Code (Act VIII. of 1859), within thirty days after the *last* process for execution was executed; for the words of the section are: ‘He’ (the defendant) ‘may apply within a reasonable time, not exceeding thirty days, after *any* process for enforcing the judgment has been executed.’

“ The respondent alleges that the last process presented for enforcing the decree has not been executed, and the appellant's Pleader is unable to show that it has been executed.”

The special appeal came on for hearing before WESTROPP, C.J., and MELVILL, J.

Shántárám Náráyan, for the respondent, took a preliminary objection that no appeal lay in this matter, as the order setting aside the decree was final, under the provisions of Sec. 119 of the Code of Civil Procedure.

Ganpatráv Bháskar, for the appellants, contended that an appeal lay, and that the thirty days allowed for such applica-

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tions counted from the first, not the last, process of execution He cited *Rádhá Binode Chowdhry v. Juggut Shurnokar (a)*, *Rádhá Binode Chowdhry v. Digamburee Dossce (b)*, and *Shaikh Gholam v. Shamsouder Koonwaree (c)*.

The following authorities were also referred to:—*Máharájab Moheshur Sing v. The Bengal Government (d)*, *Shama Churn Chuckerbutty v. Bindabun Chunder Roy (e)*, and *ShibChunder Bhadooree v. Luckee Debia Chowdhrain (f)*.

PER CURIAM:—In this case the decree was one awarding possession under a mortgage, and was also in the nature of a foreclosure decree, twelve months being allowed to the defendant for redemption. The decree was passed on the 22nd of June 1868, and was executed by delivery of the land on or before the 24th of August 1868. On the 17th of March 1870 the defendant Rámchandra presented a petition to the Subordinate Judge, in which he stated that no service of the summons in the cause had been made on himself personally, and that he was not aware of the institution of the suit until he returned home, a month and a half before the presentation of his petition. On these grounds he asked that the judgment passed against him *ex parte* might be set aside. The petition, it is to be observed, was presented more than thirty days after the defendant had necessarily become aware of the execution of the decree, and a year and a half after the decree had actually been executed by placing the plaintiff in possession of the lands. The Subordinate Judge set aside the decree, holding that the defendant Rámchandra had not been aware of the institution of the suit, although the summons had been posted on the door of his dwelling-house, and his brother defended the suit. The Subordinate Judge made no observation whatever on the great delay in presenting the petition. Now, the section of the Civil Procedure Code under which the Subordinate Judge professes to have acted is Sec. 119, which is as follows:—"No appeal shall lie from a judgment passed *ex parte* against a defendant who

(a) 6 Calc. W. Rep., Civ. R. 300. (b) 9 *Ibid.* 236.

(c) 7 *Ibid.* 375. (d) 7 Moo. Ind. App. 283, 303.

(e) 9 Calc. W. Rep., Civ. R. 181. (f) 6 Calc. W. Rep., Misc. R. 51.

has not appeared, or from a judgment against a plaintiff by default for non-appearance. But in all cases in which judgment may be passed *ex parte* against a defendant, he may apply, within a reasonable time, not exceeding thirty days after any process for enforcing the judgment has been executed, to the court by which the judgment was passed, for an order to set it aside; and if it shall be proved to the satisfaction of the court that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall pass an order to set aside the judgment, and shall appoint a day for proceeding with the suit. In all cases of judgment against a plaintiff by default, he may apply, within thirty days from the date of the judgment, for an order to set it aside; and if it shall be proved to the satisfaction of the court that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall pass an order to set aside the judgment by default, and shall appoint a day for proceeding with the suit. But no judgment shall be set aside, on any such application as aforesaid, unless notice thereof have been served on the opposite party. In all cases in which the court shall pass an order under this section for setting aside a judgment, the order shall be final; but in all appealable cases in which the court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable; provided that the appeal be preferred within the time allowed for an appeal from such final decision, and be written upon stamp paper, of the value prescribed for petitions to the court, where a stamp is required for petitions." It is to be observed that the section begins by saying that the party may apply within a certain time; it then enables the court to consider whether there is any sufficient reason for setting aside the judgment, and thereupon to make an order, which, if it reject the application, is to be appealable, while if it set aside the judgment it is to be final. The question is what is the meaning of the word "final"? We think it clear that the court would have no

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1871. jurisdiction to make any order at all unless the application were made within the time allowed by law. This seems to have been the view of the Calcutta High Court, which has decided that if a Subordinate Judge has set aside a judgment, on an application presented after the period allowed by law has elapsed, an appeal against his order will lie: *Rádhá Binode Chowdhray v. Juggut Shurnokar (g)*, *Rádhá Binode Chowdhray v. Digamburee Dossee (h)*. The latter case is a Full Bench judgment; and though the particular point of the admissibility of the appeal was only decided by the two Judges who referred the case, yet the other Judges raised no objection to their decision on the point, as we think that they would have done had they not concurred in it. We think that the word "final" can be held to apply only to the decision at which the court may arrive as to the merits of the case, that is, as to whether there has been due service, or sufficient reason for the failure of the party to attend; and we hold that an appellate court has a right to interfere when the lower court has entertained an application after the period allowed by law, and has, therefore, acted without any jurisdiction. It is only "an order under this section" (119) which is declared to be final. If an order, purporting to be made under this section, were not in fact so made, but were made under circumstances, which neither according to the language, nor the spirit of the section, would have conferred jurisdiction upon the Subordinate Judge to direct the judgment to be set aside, his order would be altogether outside the section. It would be productive of the greatest mischief if a Subordinate Judge could set aside a judgment and reopen a case after any length of time, without any remedy to the decree-holder by means of an appeal. The rehearing of a case which has been decided *ex parte* is no injury to the party who has right on his side, provided that the rehearing follow closely upon the original proceedings, and it is easy to understand why in such a case the law allows no appeal from the order reopening the suit; but a rehearing after a long interval might, and generally would, be a most unfair proceeding to a party who believed, and

would have good reason for believing, that the question at issue had been set at rest for ever, and his right firmly established.

On this point we may quote the remarks of the Judicial Committee of the Privy Council in *Maharajah Moheshur Sing v. The Bengal Government* (i), in which one of the questions considered was whether the Commissioners of Revenue were right in admitting a review of a decision in a resumption suit after the expiration of ninety days. The Judicial Committee say: "Before considering whether the review was granted in conformity with the Regulations, let us look a little to the principles upon which we think lapse of time is a most important consideration. In the present case five years and a half had passed away since the original decision. Surely, whatever may be the true import of the Regulations, the parties interested in the decision which had been made were entitled, after the lapse of a sufficient period—no appeal having been asserted, or petition for a review presented—to conclude that the Government acquiesced in what had been done by the Special Commissioners, and, in that rational conviction, to deal with the property upon the footing of the past decision."

These remarks apply equally to cases such as that now before us. We may remark that they are referred to in a case decided by the Full Bench of the Calcutta Court: *Shama Churn Chuckerbutty and others v. Bindabun Chundur Roy and another* (j), in which it was unanimously decided that the words in Sec. 378 of Act VIII. of 1859, "the order in either case, whether for rejecting the application or granting the review, shall be final," do not prevent an appeal in cases in which an application for review is improperly admitted after ninety days have elapsed. This decision goes even further than those which we have quoted on the subject of Sec. 119; for by Sec. 377 a Court is allowed a discretion as to the admission of an application after a certain time has elapsed, while Sec. 119 permits no such exercise of discretion.

(i) 7 Moo. Ind. App. 303.

(j) 9 Calc. W. Rep., Civ. R. 181. See also 11 Calc. W. Rep., Civ. R. 197, and 13 *Ibid.*, Civ. R. 436.

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Being, therefore, of opinion that we are justified by law in interfering with the order of the Subordinate Judge, if the defendants' application was made to him after the period allowed by law had expired, we have only to consider whether the application was so made. On this point we see no room for doubt. The Calcutta High Court has decided that the words "any process" in Sec. 119 mean the first process, issued against the defendant or his property: *Shaikh Gholam v. Shamsoundur Koonwaree* (k); *Shib Chunder Bhadooree v. Luckee Debia Chowdhraim* (l); *Radha Binode Chowdhry v. Digamburee Dossee* (m). We see no reason to dissent from these judgments; and, interpreting the section in this manner, we find that Rámchandra's application was made long after the expiration of the period allowed by law, and, therefore, that the Subordinate Judge had not any jurisdiction to entertain it, or to make the order which he did make, and which the District Judge—erroneously, as we think—affirmed.

For these reasons the orders of the courts below, admitting Rámchandra's application, are reversed, and the original decree of the Subordinate Judge is restored.

Order accordingly.

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 Dec. 10.

Special Appeal No. 202 of 1866.

HARI RA'MCHANDRA *Appellant.*
 MAHA'DA'JI VISHNU *Respondent.*

Mortgage without Possession in the Konkan—Possession—Registration.

A mortgage in the Konkan without possession is invalid as against a subsequent mortgagee with possession, but the registration of such a mortgage cures any defect or imperfection arising from the non-completion of the transaction by delivery of possession; and a deed so registered is good against a non-registered mortgage though accompanied by possession. Previous cases reviewed.

THIS was a special appeal from the decision of W. M. P. Coghlan, Acting Joint Judge of the Konkan at Ratná-

(k) 7 Calc. W. Rep., Civ. R. 375. (l) 6 Calc. W. Rep., Misc. R. 51.

(m) 9 Calc. W. Rep., Civ. R. 236.