APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Cornish.

PUTLAGUNTA RAMAKOTAYYA (PLAINTIFF), APPELLANT, 1931, April 1.

v.

PUTLAGUNTA SUNDARARAMAYYA AND THREE OTHERS (DEFENDANTS 1 AND 2 AND NIL), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 96—Mistake—Suit to set aside partition on the ground of—Applicability of article to.

Article 96 of the Indian Limitation Act applies to a case where a Hindu sues to set aside a partition and to get the disparity between his and the other co-parcener's share redressed by a fresh adjustment of the ancestral property on the ground of mistake or misapprehension of the correct position of affairs at the time of partition.

APPEAL against the decree of the Court of the Subordinate Judge of Masulipatam in Original Suit No. 1 of 1923.

V. Govindarajachari for appellant.

T. V. Muthukrishna Ayyar (with him *A. Venkatachalam* and *N. Muthuswami*) for first respondent.

T. V. Muthukrishna Ayyar for third respondent.

N. Ramanatha Ayyar for fourth respondent.

JUDGMENT.

The plaintiff appeals against the dismissal of his suit on the ground of limitation. The suit was filed to re-open a partition which was made between his father Nagayya and his uncle Venkataratnam, father of the defendants, in 1901. That partition comprised not only the property that belonged to the family of these two brothers but also certain property which had belonged

* Appeal No. 327 of 1925.

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to their maternal grandfather, Chinna Naganna, and was at the time in the possession of his widow, Akkamma. The plaintiff's father, Nagayya, received a larger share in that property than Venkataratnam and a correspondingly smaller share in the ancestral property. Unfortunately Akkamma survived her grandsons and the property of Chinna Naganna instead of descending to them passed away to certain agnatic reversioners. These persons sued the plaintiff and obtained a decree and eventually possession of the maternal grandfather's property in his hands on 14th December 1916. The plaintiff accordingly brought this suit in order to get the disparity between his and the defendants' shares redressed by a fresh adjustment of the ancestral property.

The first question that arises upon the issue of limitation is whether the plaintiff can claim the benefit of section 8 of the Limitation Act, namely, whether his plaint was filed within three years of the attainment of his majority.

[Their Lordships discussed the evidence and found that the suit was not filed by the plaintiff within three years of the attainment of his majority, and proceeded as follows :—]

We have then to enquire what is the appropriate article of the Limitation Act to which this suit should be held to be subject. The learned Subordinate Judge has applied article 96; and, after hearing arguments with regard to the applicability of that article and some others, we can find no reason to differ from his conclusion, supported as it is by a decision of the Bombay High Court, *Martand Mahadev* v. *Dhondo Moreshwar*(1). The terms of the article are perfectly general, the

(1) (1920) I.L.R. 45 Bom. 582.

description of the suit to which it relates being one for relief on the ground of mistake, and the time from which the period runs being, when the mistake becomes known to the plaintiff. The plaint itself in this case is based upon the ground that a mistake was made, and we think it is clearly appropriate that time should run from the moment when the circumstances with regard to his title to the property first came to the attention of the plaintiff. Mr. Govindarajachari has endeavoured to urge certain objections to the applicability of this article. He suggests, in the first place, that a suit for re-partition, as he would call it, is based upon principles of Hindu Law and, as far as we understand him, that accordingly some other article would be more appropriate for that reason. There can be no doubt that the claim is based upon equitable principles, whether or not those principles derive from Hindu Law or from any other source. We may refer to *Maruti* v. *Rama*(1), where a suit of a similar character came under consideration; and the learned Judges quote Sir Thomas Strange with regard to its maintainability:

"Whenever from any cause not understood at the time the division proves to have been unequal or in any respect defective, it may be set to rights notwithstanding the maxim 'Once is partition of the inheritance made'";

and they go on to say that

"they (the parties) had divided under such a misapprehension of the true state of the case that the Hindu Law, like common equity, would correct the error . . ."

The nature of such a suit has been very clearly defined by WALSH J. in *Ganeshi Lal* v. *Babu Lal*(2) where he observes that

"the right is based simply upon this principle, that where parties arrive at a partition either by agreement, or by a decree . . . there is an implied and mutual right of

(1) (1895) I.L.R. 21 Bom. 333. (2) (1918) I.L.R. 40 All. 374.

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indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties."

We cannot see any reason why an article in the terms of article 96 should not apply to a suit of this nature.

It has then been suggested that because it involves a claim to immovable property the lower Court should more appropriately have applied one of those articles which specifically relate to immovable property. We cannot think that article 127, which governs a suit brought by a person excluded from joint family property, can have any application; because only upon the footing that the original partition was void can it be said that the property remained joint family property. It has been held in the Full Bench Case, *Yerukola* v. *Yerukola*(1), that a mere division in status will render that article inapplicable. Lastly there is the residuary article 144, relating to suits for possession of immovable property not otherwise specially provided for. This should not, we think, be applied unless no more specific article, such as article 96, is available. Nor does it seem appropriate to apply the article 144 to a suit which does not claim any specific immovable property but only compensation in the shape of a share in the original property divided. We cannot see, further, how the cause of action can be traced to the commencement of adverse possession on the part of the defendants. The cause of action clearly arose out of the consequence of the mistake that was committed, and which alone gave the plaintiff his right to sue. We think accordingly that there are no grounds for differing from the lower Court that the article applicable is article 96. That

(1) (1922) I.L.R. 45 Mad. 648 (F.B.).

article gives the plaintiff three years within which to bring his suit and the latest possible date from which time would run would be that of his dispossession in pursuance of the decree against him, namely, 14th December 1916. The suit was accordingly out of time and was rightly dismissed.

We dismiss the appeal with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

THOPPAI VENKATARAMA AYYAR (PETITIONER), APPELLANT,

v.

A. GOVINDARAJULU AYYAR (RESPONDENT), RESPONDENT.*

1931, February 12.

Code of Civil Procedure (Act V of 1908), sec. 144—Costs paid under decree afterwards reversed on appeal—Refund of, by way of restitution—Party entitled to—Interest on such costs—Right of party to.

Under section 144 of the Code of Civil Procedure a party who is entitled by way of restitution to a refund of costs paid by him under a decree afterwards reversed on appeal is ordinarily entitled to interest on such costs.

APPEAL against the order of the District Court of Madura, dated 15th July 1926, and made in Execution Application No. 55 of 1926 in Original Suit No. 1 of 1922.

K. Rajah Ayyar (*P. N. Appuswami Ayyar* with him) for appellant.

T. Krishnaswami Ayyangar (*S. K. Narasimhachari* with him) for respondent.

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* Appeal against Order No. 433 of 1926.