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the respondents more than a half share. In these circumstances it must be presumed that when the respondents took possession of the whole property they did so for themselves and their co-owner.

The judgement of their Lordships recognizes that there may be cases of an exceptional nature in which ouster may be presumed, but we can discover no ground whatever for treating this case as falling in that category. On the contrary, as already pointed out, the respondents' vendors seem to have laid claim to no more than a half share in the property, though they may have been in possession of the whole.

In our opinion the appellant was entitled to rely upon the presumption that possession was held by respondents and their predecessors in title on his behalf and it lay upon the respondents to prove that they or their predecessors had set up an adverse title to the appellant's share to the knowledge of the appellant more than twelve years before the suit. This they failed to do.

We allow this appeal, set aside the decree of the lower appellate court and remand the case to that court for decision on the merits. Costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

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January, 12.

Before Mr. Justice Chamier and Mr. Justice Piggott.

MATHURA PRASAD (APPLICANT) *v.* RAM CHARAN LAL (OPPOSITE PARTY.)*

Civil Procedure Code (1908), order IX, rule 13—Decree ex parte—Application to set aside decree—Appeal—Decree confirmed in appeal before hearing of application to set it aside.

When the High Court has once confirmed a decree on appeal, it is not open to the court which passed the decree to entertain an application to set the decree aside, and it makes no difference that the application to set the decree aside was filed before the appeal was disposed of.

THIS appeal arose out of a suit for sale upon a mortgage. In that suit a decree was passed against several defendants. One of the defendants, as against whom the decree was *ex parte*, applied to have the decree set aside under order IX, rule 13, of the Code of Civil Procedure. Some time after this application had been filed the defendants who had contested the suit appealed against the

* First Appeal No. 46 of 1914, from an order of Abdul Ali, Additional Subordinate Judge of Cawnpore, dated the 23rd of December, 1913.

decree. When the application for restoration came on for hearing it was found that the record of the case had gone up to the appellate court. The hearing of the application was postponed from time to time on the ground that the record had not come back from the appellate court. After the appeal had been decided and the record had come back, the court took up the application and dismissed it on the ground that it had no jurisdiction to set aside the decree after it had been confirmed by the appellate court. The applicant appealed from this order.

Munshi *Benode Behari*, for the appellant :—

When application for setting aside the *ex parte* decree was made in the original court no appeal against the decree had been filed. That court certainly had jurisdiction to entertain the application. The fact that subsequently an appeal was filed against the decree and was pending in the appellate court when the application came on for hearing did not deprive the original court of its jurisdiction to deal with the application; *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (1), *Damodar Manna* v. *Sarat Chandra Dhal* (2) and *Chenna Reddi* v. *Peddaobi Reddi* (3).

Pandit *Baldeo Ram Dave*, (for the Hon'ble Dr. *Sundar Lal*), for the respondent :—

When a decree has been appealed against and while the appeal is pending the original court cannot continue to exercise jurisdiction at the instance of any of the defendants against whom the decree was *ex parte*. The power of that court to deal in any way with the litigation is completely in abeyance except only to execute the decree; *Ramanadhan Chetti* v. *Narayanan Chetty* (4), *Dhonai Sardar* v. *Tarak Nath Chowdhury* (5).

At all events, after the appeal has been decided the original decree ceases to exist and becomes merged in the appellate decree; and the original court cannot, thereafter, alter, amend or interfere with the original decree; *Brij Narain* v. *Tejbal Bikram Bahadur* (6), *Sankara Bhatta* v. *Subraya Bhatta* (7), *Dhonai Sardar* v. *Tarak Nath Chowdhury* (5).

(1) (1911) I. L. R., 38 Calc., 394.
(2) (1909) 13 C. W. N., 846.
(3) (1909) I. L. R., 32 Mad., 416.
(4) (1904) I. L. R., 27 Mad., 602.
(5) (1910) 12 C. L. J., 53.
(6) (1910) I. L. R., 32 All., 295.
(7) (1907) I. L. R., 30 Mad., 535.

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This was also pointed out in the case in I. L. R., 38 Calc., 394 cited by the appellant. In the case in 13 C. W. N., 846, the appeal was pending.

Munshi *Benode Behari*, in reply—

In the present case the application for restoration was filed before the appeal was filed. That is a distinguishing feature. The lower court should have proceeded to try and dispose of the application on the merits. It was no fault of the appellant that the court put off the hearing of the application again and again, and waited until after the appeal was decided. The appellant has been wrongly deprived of his remedy.

CHAMIER and PIGGOTT, JJ.—This is an appeal against an order of the Additional Subordinate Judge of Cawnpore, dismissing an application presented by the appellant to have a decree passed against him *ex parte* set aside on the ground that he received no notice of the institution of the suit. It appears that the suit was one on a mortgage and that there were several defendants including the present appellant. The case was decided by the court of first instance on the 20th of September, 1911. On the 30th of November, 1911, the present appellant presented his application to have the decree set aside as against him. When the application was called on for hearing it was discovered that the file of the original suit had been sent to this Court in consequence of an appeal which had been filed by other defendants. The hearing of the application was put off from time to time, the court apparently being of opinion that it was unnecessary or impossible to take up the application until after the appeal had been disposed of by this Court. The appeal was disposed of by this Court on the 24th of February, 1913, and after the record had been returned to the court below the applicant's application was taken up. It was dismissed by the Subordinate Judge on the ground that he had no jurisdiction to alter or set aside the decree passed by him inasmuch as it had been confirmed by and become, as he says, merged in the decree passed by this Court. We have been referred to several decisions bearing on the question whether a court of first instance has power to alter or set aside its decree after an appeal has been filed against that decree. There seems to be some difference of opinion on the question whether a

lower court can entertain an application for review or to set aside or alter its decree while an appeal against the decree is pending in a superior court, but all the authorities seem to be agreed that when a decree has been passed by the superior court the lower court cannot alter or amend its decree. In the present case as shown above the application of the applicant was made before the appeal was filed to this Court and it may be that even after the appeal was filed the Subordinate Judge might have disposed of the application. But now that the decree of the lower court has been superseded by the decree of this Court we feel bound to hold that the Subordinate Judge has acted rightly in rejecting the application. It seems to us that the appellant ought to have insisted on having his application heard, and, if the Subordinate Judge declined to take up the application, he should have applied to this Court for an order requiring the Subordinate Judge to take up the application, or he should have presented an original application to this Court to set aside the *ex parte* decree. As matters now stand nothing can be done; the appeal must be dismissed.

The respondent contends that the appeal has been undervalued. The valuation of the original suit was over Rs. 5,000, and a decree was passed in favour of the plaintiff for over Rs. 6,000, and it is contended that the proper valuation of this appeal is the amount of the decree passed on the mortgage. We are not prepared to accept this contention. The appellant is interested only in a small portion of the mortgaged property which he says he purchased in execution of a decree passed before the mortgage in suit. The measure of his interest in the suit appears to us to be the value of the property which he held. He valued his appeal at Rs. 200 and there is nothing to show that this valuation is erroneous. The appeal is dismissed with costs.

Appeal dismissed.