1920.

BHIMAJI RAMCHANDRA v. BHIMABAI.

be held to have conclusively determined the right to possession at that date. As it was made less than twelve years before the filing of the suit plaintiff who claims through the auction-purchaser is entitled to succeed.

On these grounds I agree with the orders proposed.

Decree reversed.

R. R.

APPELLATE CIVIL.

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

1920.

August 11.

MARTAND MAHADEV DUNAKHE (ORIGINAL DEFENDANT), APPELLANT *v.* DHONDO MORESHWAR DUNAKHE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Indian Limitation Act (IX of 1908), Schedule I, Article 96—Mistake—Discovery of mistake when first Court's decree was passed—Appeal—Dismissal of appeal—Time begins to run from the date of the first Court's decree.

In 1903, plaintiff No. 2 obtained a decree for partition against the defendant, his father and plaintiff No. 1. In execution of that decree a compromise was effected between the parties and certain properties, including a mortgage-debt due to the family, were allotted to plaintiffs Nos. 1 and 2. The plaintiffs sued the mortgagors in 1910 to recover the mortgage amount but the suit was dismissed as it was held that the consideration for the mortgage had been paid off. The decree of the trial Court was passed in 1912. The plaintiffs appealed but the appeal was dismissed on the 11th July 1914. On the 28th June 1917, the plaintiffs sued to recover from the defendant their share of the loss. The Subordinate Judge found that it was a case of mutual mistake under which all the parties considered that the mortgage was a perfectly good asset and therefore held the defendant liable to contribute to the loss. On appeal to the High Court, it was contended that the suit was barred by limitation,

Held, that the suit was barred under Article 96 of the Limitation Act as the discovery of the mistake, dated not later than the first Court's decree which was passed in 1912 and time began to run against the plaintiff from that date

* First Appeal No. 266 of 1918.

1920.

MARTAND MAHADEV v. DHONDO MORESHWAR.

Hukumchand v. *Pirthichand*[1], relied on.

Under Indian law an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal.

FIRST appeal against the decision of V. V. Pataskar, Additional First Class Subordinate Judge at Poona in Suit No. 282 of 1917.

Suit to recover a sum of money.

Moro and Mahadev were the sons of Naro. Plaintiffs were the sons of Moro and defendant was the son of Mahadev. They were all members of a joint Hindu family.

In 1903, plaintiff No. 2 filed a Suit No. 241 of 1903 against the defendant, his father and plaintiff No. 1 for partition and obtained a decree for partition on the 5th June 1905. In execution of that decree, a compromise was effected between plaintiffs Nos. 1 and 2 and the defendant and in pursuance of that compromise certain properties including a mortgage for Rs. 3,000, dated the 12th December 1895 and executed by one Khanderão Amritrao Naik Jagtap in favour of Naro, were allotted to plaintiff's share.

In 1910, the plaintiffs brought a Suit No. 378 of 1920 against the mortgagor's heirs for the recovery of Rs. 5,632 due on the mortgage. The suit was dismissed on the ground that the mortgage was satisfied. The decree of the trial Court was passed in 1912. Against this decree, the plaintiffs appealed to the High Court, but the appeal was dismissed on the 1st July 1914.

On the 28th June 1917, the plaintiffs filed the present suit to recover Rs. 9,000 from the defendant as compensation for the loss they sustained alleging that there

[1] (1918) 21 Bom. L. R. 632.

1920.

MARTAND MAHADEV v. DHONDO MORESHWAR.

had been fraud when the partition was effected, and that the defendant knew perfectly well that the mortgage was paid off.

The defendant contended, *inter alia*, that he had no knowledge of any of the family dealings and never represented to the plaintiffs that the sum due under Jagtap's mortgage was recoverable; that from the other securities taken by the plaintiffs they had recovered far more than the expected sums and that the defendant was not liable for the loss the plaintiffs suffered in respect of Jagtap's mortgage.

The Subordinate Judge held that the evidence showed that there had been no fraud, that it was purely a mutual mistake under which all the parties considered the mortgage of 1895 as a perfectly good asset and that the amount apparently due on it could be recovered from the mortgagor. On the authority of *Davloba* v. *Rayagavda*[1], he held that the defendant was liable to contribute to the loss to the extent of one-half and passed a decree in favour of the plaintiffs for Rs. 3,439.

The defendant appealed to the High Court.

Sir Thomas Strangman, Advocate-General, with *D. C. Virkar*, for the appellant:—Fraud is not proved. The lower Court finds that the parties were under a mutual mistake. Article 96 of the Indian Limitation Act governs the case. The plaintiffs must have known the mistake when the document was filed. But in any case the mistake became known to the plaintiff on the day the first Court in the previous suit held that the mortgage had been paid off. The plaintiff took the risk of limitation in appealing to the High Court and not suing the defendant in time. The principle laid down

[1] (1883) P. J. 227.

by the Privy Council in *Hukumchand* v. *Pirthichand*[1] is applicable. *Bassu Kuar* v. *Dhum Singh*[2] can be distinguished on the ground that there the High Court reversed the decree of the lower Court and it was only then that the cause of action accrued. Even after the High Court dismissed the appeal the plaintiffs still had considerable time in which to file the suit.

Nadkarni, with *P. B. Shingne*, for the respondents:—Plaintiff's suit is in substance a suit for re-opening the partition or re-adjustment of rights of co-parceners *inter se*. This right in plaintiff's favour arises under express texts of Hindu law and is also recognised by our decisions in *Davloba* v. *Rayagavda*[3] and *Maruti* v. *Rama*[4]. Property in the hands of defendant against which the plaintiff would be entitled to proceed is immoveable property. *Prima facie*, therefore, Article 144 would apply. If, however, the suit is to be treated as a suit for restitution or re-adjustment of rights of co-parceners on payment to the plaintiff of a sum which the Court might deem just the proper Article would be Article 120. Plaintiff did not rest his cause of action on mistake though the Court might give him appropriate relief on the ground of mistake. The Privy Council case (*Hukumchand* v. *Pirthichand*)[1] is clearly distinguishable. It proceeds purely upon a consideration of Article 97 which is concerned with "money paid upon an existing consideration which afterwards fails". There the suit was primarily and soley for "money" alone, not so in the present case. Moreover, that Privy Council case is in conflict with *Bassu Kuar* v. *Dhum Singh*[5] where Lord Hobhouse remarked: "It would be an incovenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property

(1) (1918) 21 Bom. L. R. 632 at p. 637.
(2) (1888) 11 All. 47.
(3) (1883) P. J. 227.
(4) (1895) 21 Bom. 333.
(5) (1888) 11 All. 47 at p. 56.

1920.

MARTAND MAHADEV v. DHONDO MORESHWAR.

if he does not." The plaintiff was accordingly justified in appealing to the High Court from the first Court's decision. The only course open to the plaintiff after the decision of the High Court was to sue the defendant. Time therefore ran from the decision of the High Court decree, when all remedies were exhausted and no other course was open to the plaintiff. Appeal is a continuation of a suit. As soon as an appeal is filed the appeal Court becomes seized of the case which is *sub judice* again. It is well-known that for purposes of *res judicata* and limitation for execution of decrees, the appellate Court's decree alone must be looked at. The Madras High Court has held in *Rajagopalan* v. *Somasundara Thambiran*[1], relying on *Bassu Kuar* v. *Dhum Singh*[2], that time begins to run from the date of the appellate Court's decree although the decree is one of dismissal of appeal. In view of *Bassu Kuar's* case[2] there is no difference between a decree of dismissal of appeal and a decree of reversal. The case of *Rajagopalan* v. *Somasundara Thanbiran*[1] has been followed by the Madras High Court in several subsequent cases. Of the two Privy Council cases *Bassu Kuar* v. *Dhum Singh*[2] should be followed as being in consonance with equity. Plaintiff's suit is within time from the decree of the High Court in appeal.

MACLEOD, C. J.:—The plaintiffs sued to obtain an order against the defendant enjoining him to make good the plaintiffs' share by payment to plaintiffs of Rs. 9,000 and interest thereon after date of suit and costs. Plaintiff No. 2 filed Suit No. 241 of 1903 against the defendant, his father and plaintiff No. 1 for partition and obtained a decree for partition in the Poona Court on the 15th of June 1905. Plaintiff No. 2 then filed a Darkhast No. 85 of 1907 for execution of that

(1) (1907) 30 Mad. 316 at p. 319. (2) (1888) 11 All. 47 at p. 56.

decree. A compromise was effected between plaintiffs Nos. 1 and 2 and the defendants. In pursuance of that compromise certain properties were allotted to plaintiffs Nos. 1 and 2 including a mortgage, dated 12th December 1895 and executed by one Khanderao Amritrao Naik. Under the compromise plaintiffs Nos. 1 and 2 got a right to recover Rs. 3,000 including principal and interest on that mortgage. The plaintiffs sued the mortgagor in Suit No. 378 of 1910 but it was held that the consideration for the mortgage had been paid off so plaintiffs' suit was dismissed with costs. The plaintiffs appealed to the High Court. The High Court dismissed the appeal on the 1st of July 1914. The decree of the lower Court was in 1912. Plaintiffs alleged that there had been fraud when the partition was effected, and that the defendant knew perfectly well that this mortgage had been paid off. However in the trial Court it was proved to the satisfaction of the Judge that there had been no fraud, that it was purely a mutual mistake under which all the parties considered this mortgage a perfectly good asset and that the amount apparently due on it could be recovered from the mortgagor. On the authority of *Davloba* v. *Rayagavda*[1] which was followed in *Maruti* v. *Rama*[2] he held that the defendant was liable to contribute to the loss to the extent of one-half and passed a decree in favour of the plaintiffs for Rs. 3,439 odd adding to the mortgage debt which the plaintiffs had failed to recover the costs in both Courts in his suit against the mortgagor. No question of limitation was raised in the lower Court.

In first appeal it has been contended that this suit is barred by limitation. It must be admitted that if Article 96 does not apply, then accepting the finding

(1) (1883) P. J. 227.

(2) (1895) 21 Bom. 333.

1920.

MARTAND MAHADEO v. DHONDO MORESHWAR.

of the Court below that there had been no fraud, Article 120 must apply. But the appellant contends the plaintiffs had only three years within which to file the suit from the date when the mistake with regard to this mortgage became known to them. Clearly, therefore the cause of action against the defendant was that there had been a mistake as regards this particular item, which was treated to be a valuable asset belonging to the family property. It was taken as representing Rs. 3,000 in the partition and it turned out unfortunately for the plaintiffs that there was no debt at all due to the mortgagor. Therefore, both parties were under a mutual mistake, and plaintiffs' right to recover from the defendant his share of the loss caused by that mistake arises in equity, as has been held in the cases referred to above. Plaintiffs are, therefore, seeking for relief for the loss which they have incurred owing to mistake, and it appears to me, therefore, that Article 96 of the Indian Limitation Act must apply. But it is contended that time began to run, not from the date when the first Court held that the mortgage had been paid off, but from the date of the High Court's decree dismissing the appeal. That question was considered in a somewhat kindred case by the Privy Council in *Hukumchand* v. *Pirthichand*[1]. In that case the point was, when did time begin to run in a suit under Article 97. The money was paid upon an existing consideration which afterwards failed, and time began to run from the date of the failure. The same point was taken as was taken in this case. Their Lordships said at page 637 : "as between these two decrees, that is to say, the decree of the first Court and the decree of the appellate Court, the view of both the lower Courts that the failure of the consideration was at the date of the first Court's decree was correct, for whatever may

[1] (1918) 21 Bom. L. R. 632.

be the theory, under the Indian law an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal." Here the plaintiffs' suit was dismissed and they then discovered by the decision of the Court that the mortgage had been paid off. It was open to them of course to appeal and to endeavour to get the decision of the first Court reversed. That would have been to their advantage if they succeeded, because even if they succeeded in the present case they could only recover half the loss. But it seems to me quite clear that the discovery of the mistake, dated certainly from not later than the first Court's decree and time then began to run against the plaintiffs. We have been referred to the case of *Bassu Kuar* v. *Dhum Singh*[1]. But there the High Court reversed the decree of the lower Court and it was only when that occurred that the cause of action arose. It appears to me, therefore, we must take it that time began to run against the plaintiffs in 1912 and that this suit to recover from the defendant his share of the loss must be barred under Article 96. There is no hardship in the case, because even after the High Court dismissed the appeal in 1914, the plaintiffs still had a considerable time in which to file this suit.

The appeal, therefore, I think, must be allowed and the plaintiffs' suit dismissed.

As this point was not taken in the Court below we make no order as to costs.

The cross-objections are dismissed with costs.

Decree reversed.

J. G. R.

[1] (1888) 11 All. 47.