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distinguishable on the ground that the fact does not appear from the original record of the case on the file of this Court; and further that that aspect of the point does not appear to have been expressly considered. The observations of Crowe J., which were not necessary for the decision of *Ningareddi's case*⁽¹⁾ are referable to this reading of *Khemkor's case*⁽²⁾ which, for the reasons I have just stated, is not justified by the facts in that case.

I should have referred this point for decision to a Full Bench if I were satisfied that the point which we have to decide was covered by the decision in *Khemkor's case*⁽²⁾. As on the facts the case is distinguishable and as I am clear that a kept mistress whose husband is alive cannot be treated as an *avaruddha stree* who is entitled to maintenance on the death of her paramour out of his estate, I see no objection to give effect to that view.

I would, therefore, allow the appeal, reverse the decree and dismiss the suit. Under the circumstances each party should bear his or her costs throughout.

CRUMP, J. :—I agree.

Decree reversed.

J. G. R.

⁽¹⁾ (1873) 10 Bom. H. C. 331.

⁽²⁾ (1901) 26 Bom. 163.

APPELLATE CIVIL.

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November
16.

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

ACHYUT VISHNU PATANKAR (ORIGINAL DEFENDANT No. 2), APPELLANT v. TAPIBAI KOM KRISHNAJI JOSHI AND OTHERS (HEIRS OF ORIGINAL PLAINTIFF), RESPONDENTS*.

Review—Order granting review, effect of—Original order remains in suspense.

When an appellate Court, which has set aside the decree of the lower Court, subsequently admits an application for a review of its judgment, the effect

* Appeal from Order No. 62 of 1922.

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thereof is not to restore the decree of the trial Court but to hold in suspense the decree of the appellate Court until it has been decided whether it should stand or not.

APPEAL from order passed by C. C. Dutt, District Judge of Ratnagiri.

Application to set aside abatement.

The plaintiff filed a suit in the Subordinate Judge's Court at Ratnagiri to recover possession of certain immoveable property, and obtained a decree.

On appeal, the District Judge set aside the decree and dismissed the plaintiff's suit on November 29, 1919.

The plaintiff then applied for a review of the judgment of the appellate Court and on February 19, 1920, the District Judge granted the application.

The defendant appealed against the order to the High Court but without any success.

On September 17, 1921, the plaintiff died. On April 28, 1922, an application was made to substitute the heirs of the plaintiff. The District Judge held that the heirs not having been brought on record for about eighteen months, the appeal had abated and, therefore, rejected the application as timebarred.

The defendant appealed to the High Court.

G. B. Chitale, for the appellant.

D. S. Varde, for respondent No. 2.

MACLEOD, C. J. :—This appeal raises a very curious point with regard to the procedure to be followed in cases where a review has been granted of the judgment of a Court, and the party obtaining the review has taken no steps to proceed further in the matter. There seems to be no authority on the point. The history of the case is as follows. The plaintiff filed a suit in the

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Subordinate Judge's Court for possession of certain property and obtained a decree. On appeal to the District Court, the decree of the lower Court was set aside and the plaintiff's suit was dismissed with costs. The plaintiff then applied for a review of the judgment of the appellate Court, and on February 19, 1920, the District Judge granted the application. In the judgment as first written the District Judge not only granted the review application, but confirmed the decree of the lower Court by setting aside the decree of the appellate Court. But evidently it was pointed out to him that this was not the correct course to follow, for the words "Decree of the lower Court is confirmed" were struck out; and the learned Judge added "I shall rehear the case on its merits. Both sides to argue the appeal on its merits over again." That was the proper order to make.

The real question is whether, when a review of a judgment has been ordered, the judgment is set aside or only held in suspense until the case has been reheard. Although it is not material for the purpose of this judgment, I mention that defendant No. 2 appealed against the order granting a review to the High Court. That appeal was unsuccessful.

On September 17, 1921, the plaintiff died, and, on April 28, 1922, as his heirs had not been brought on the record for about eighteen months, when an application was made to substitute the heirs of the plaintiff, the Judge considered that the appeal had abated. If that order were correct, it follows that the appellate Court's order dismissing the plaintiff's suit would disappear, and the decree of the lower Court would be restored. We think that the order made by the District Judge on April 28, 1922, directing that the appeal abated was wrong. The effect of the review

order was not to restore the decree of the trial Court but to hold in suspense the decree of the appellate Court until it had been decided whether it should stand or not. Therefore, the death of the plaintiff-respondent could not in any way affect the status of the appellate decree.

Another way of looking at the question would be to consider who is the party to move the Court after a review application has been granted. Clearly the party who has applied for a review. The other party stands by the order already made, and if the party to whom the review has been granted takes no steps to re-argue the matter, it is perfectly clear that the original order still remains though it could not be enforced until the review order had been discharged for non-prosecution. It was for the plaintiff, therefore, or his heirs to appear before the Court of the District Judge to re-argue the appeal. What arguments may be put forward or what issues may be raised on such an appearance, it is not for us to say. We merely decide now that the order of the District Judge directing that the appeal abates must be set aside, and it remains for the plaintiff's heirs to take such steps as they may be advised to get the appellate Court's decree dismissing the plaintiff's original suit with costs set aside. The appeal is allowed and the order of abatement of the appeal of the District Court set aside. The appellant to get his costs of this appeal.

Appeal allowed.

J. G. R.

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