APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

VENKANNA AND OTHERS (DEFENDANTS), APPELLANTS,

v.

AITAMMA (PLAINTIFF), RESPONDENT.*

1888. August 30. 1889. Jan. 15.

Civil Procedure Code, s. 13—*res judicata—Declaratory decree—Maintenance suit, ecree in—Annual payments.*

A Hindu widow obtained a decree in 1876 which provided that she should receive future maintenance annually at a certain rate, but did not specify any date on which it should become due. In 1887 she filed the present suit claiming arrears of maintenance at the rate fixed in the decree of 1876 :

Held, that the suit did not lie. *Sabhanatha* v. *Lakshmi* (I.L.R., 7 Mad., 80) distinguished.

SECOND appeal against the decree of J. W. Best, District Judge of South Canara, in appeal suit No. 249 of 1887, affirming the decree of A. Venkataramana Pai, District Munsif of Mangalore, in original suit No. 25 of 1887.

This was a suit by a Hindu widow against the brother and nephews of her late husband to recover Rs. 392-2-0 as arrears of maintenance due up to December 14, 1886, at the rate of Rs. 110 per annum.

The above rate of maintenance had been determined in the decree passed by consent in a previous suit—original suit No. 39 of 1876. In that suit the plaintiff had claimed future maintenance as well as arrears of maintenance already accrued, and obtained a decree which provided that she should receive future maintenance at the above rate annually, but did not specify any particular date on which the annual payments were to be made. An application made by the plaintiff some years afterwards for the execution of this decree was rejected as being barred by limitation. In the present suit it was pleaded that the claim was barred by the law of limitation, and also that the claim was *res judicata* under s. 13 of the Code of Civil Procedure.

* Second Appeal No. 28 of 1888.

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The District Munsif held that the suit was not barred by the law of limitation, on the ground that twelve years had not elapsed since any part of the arrears became payable (Limitation Act, 1877, sch. II, art. 128), and that it was not affected by s. 13 of the Code of Civil Procedure. As to the latter point he said:—

"The claim for future maintenance was made and allowed by mutual consent of the parties, but the wording of the decree was defective in that it did not specify a 'certain date' (*vide* art. 179 (6) of the Indian Limitation Act, 1877), for payment, and it was decided that the execution was barred. The omission to specify a date for payment deprived the plaintiff of the right to enforce such payment by process of execution upon the decree, but the right to maintenance has not been lost and may be enforced by a fresh suit *Sabhanatha* v. *Lakshmi*(1). This right was never denied, but has been established by the decree on the defendant's admission.

"Further, the decree was passed in terms of the compromise effected between the parties, and the fact that by those terms the parties did not choose (as since finally decided) to give the plaintiff the right to enforce annual payments on account of her maintenance *in the same suit*, does not amount to a determination by the Court on the merits negativing the existence of such right. Even when after trial of a suit, the Court declines to grant a decree for recovery of annual payments in execution in the same suit, but declares that the claimant possesses the right to such payments, there would be nothing to prevent a fresh suit for each year's amount."

The District Munsif accordingly passed a decree for the amount claimed and his decree was affirmed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. *Subramanyam* for appellants.

This suit being a suit for arrears of maintenance, is not governed by *Sabhanatha* v. *Lakshmi*(2). The widow is precluded by the decree in original suit No. 39 of 1876 from suing a second time in respect of the same relief: that decree was not a declaratory decree. *Sanjeeviyah* v. *Nanjiyah*(3).

Ramachendra Rau Saheb for respondent.

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(1) I.L.R., 7 Mad., 80. (2) I.L.R., 7 Mad., 80.
(3) 4 M.H.C.R., 453.

The lower Courts were right in regarding the decree of 1876 as a declaratory decree. *Vijaya* v. *Sripathi*(1), *Ruka Bai* v. *Ganga Bai*(2). The proper way to enforce the plaintiff's right to future maintenance established by that decree was to bring a fresh suit. *Vishnu Shambhog* v. *Manjamma*(3).

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C. J., and Shephard, J.).

JUDGMENT :—The defendants appeal against a decree allowing the plaintiff a sum of Rs. 454 on account of arrears of maintenance, which are claimed at a rate fixed by the decree in a former suit between the parties (original suit No. 39 of 1876). It is objected on behalf of the defendants that the plaintiff was precluded from bringing the present suit, because in the former suit, she had prayed not only for arrears of maintenance, but also for maintenance at the same rate in the future; and it was argued that whether or not relief in respect of future maintenance was granted, the present suit would not lie, because in accordance with her prayer in the suit of 1876, she might have obtained a decree which she might have put in execution as regards future arrears as they became due. It seems clear that in the former suit she did ask for relief as to future maintenance and that it was intended to give her such relief, but unfortunately the decree was so drawn up, no date of payment being given, that it has been held that it is incapable of execution. It is contended for the plaintiff that the principle on which the defendants rely is inapplicable, because a Court trying a maintenance suit can only settle the rate of maintenance payable under the then existing circumstances, and cannot make a decree fixing the amount for ever afterwards. It is true that the decree in a maintenance suit is not final in the sense, that the rate fixed can never be altered. If there is a change in the circumstances of the family and the persons obliged by the decree, it may be that they are entitled to have the rate of maintenance reduced; but does not follow that a decree for future maintenance cannot be made, or that it is not final until the circumstances of the family are proved to have altered for the worse.

We think there is no doubt that such a decree may be made,

(1) I.L.R., 8 Mad., 94. (2) I.L.R., 1 All., 594.
(3) I.L.R., 9 Bom., 103.

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and that when a person entitled to maintenance not contented with asking for a declaratory decree has asked for a decree relating to future maintenance, he cannot thereafter bring a separate suit to recover arrears of maintenance. If his former decree has provided for payment periodically and is properly drawn up, he can recover arrears in execution. If his former decree has made no such provision or is not regularly drawn up, it must be either because the relief asked for has been refused or because some mistake has been made. In the former case his remedy is by appeal; in the latter, which is the present case, he can obtain redress by review. The present case differs from *Sabhanatha* v. *Lakshmi* (1), for there it was a declaratory decree only that the plaintiff had obtained in the former suit, and the point now under discussion did not arise. We think the appeal must be allowed. The decrees of the Courts below must be reversed and the suit must be dismissed but without costs.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

1888. Nov. 23.

LUIS AND OTHERS (DEFENDANTS IN O.S. No. 11 OF 1888), PETITIONERS,

v.

LUIS (PLAINTIFF IN O.S. No. 11 OF 1888), RESPONDENT.*

Civil Procedure Code, ss. 494, 588, 622—No appeal lies against an order for issue of notice made under s. 494—Revision by High Court of an order purporting to be made on appeal from such an order.

A petition praying for a temporary injunction in a suit was presented by the plaintiff in a Subordinate Court.

The Judge refused to pass orders on it without hearing the defendants, and ordered notice to issue to them. The plaintiff appealed to the District Judge who granted the injunction prayed for:

Held, that no appeal lay from the Subordinate Court, and that the District Judge had purported to exercise a jurisdiction not vested in him by law.

PETITION under s. 622 of the Code of Civil Procedure, praying the High Court to revise the order of J. W. Best, District Judge

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(1) I.L.R., 7 Mad., 80. * Civil Revision Petition No. 204 of 1888.