NARAYANA v. RANGA.

the nature of the office." Unless the alienee is the sole heir, the alienor might be under the temptation to make the office the subject of bargain and thereby defeat the intention of the founder. It was in this view that we called for a finding at the former hearing. We are not prepared to dissent from the dictum above quoted, and to hold that in the absence of special usage an alienation would be valid if made in favour of any person other than the sole immediate heir.

It was then argued that in the case before us the brothers of the plaintiff's father consented to the alienation in his favour, and that there is evidence to that effect on the record.

On looking at the evidence of Lakshman Joishi, one of the brothers, we find no distinct admission regarding the office. Moreover this point was not taken at the last hearing, nor we were asked to call for a finding as to the alleged consent. We cannot at this stage allow this point to be raised and order a new trial regarding it. Of course it is not intended that those who may have a claim by hereditary right, the legal heir, should be in any wise prejudiced by this judgment. We must reverse the decree of the Courts below and dismiss the suit. Under the circumstances we direct each party to bear his own costs throughout.

APPELLATE CIVIL.

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

1891. Oct. 6. Nov. 18.

MUTTAKKE AND OTHERS (DEFENDANTS NOS. 1 TO 16 AND 18 TO 41), APPELLANTS,

v.

THIMMAPPA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Aliyasantana Law—Specific Relief Act—Act I of 1877, *s.* 42—*Declaratory relief—Limitation Act—Act XV of* 1877, *sched. II, arts.* 127, 144.

In a suit in which the plaintiffs sought declarations that they were members of an undivided Aliyasantana family with the defendants, that certain property belonged to the family, and that plaintiff No. 1, the senior member of the family,

* Appeal No. 131 of 1890.

was entitled to have the lands registered in his name, the defendants denied the allegations in the plaint, and pleaded that the suit for declarations only was not maintainable, and that it was barred by limitation. It was found that the plaintiffs had separated themselves from the defendants, and had for more than twelve years been excluded to their own knowledge from the joint family property :

Held, that, if as alleged by the plaintiffs, plaintiff No. 1 was the *de jure* ejaman of the family, he was entitled to the possession and management of the family property, and a suit for a mere declaration of his right would not lie—*Chandu* v. *Chathu Nambiar*, I.L.R., 1 Mad., 381, distinguished.

Per curiam : "We are of opinion that article 127 applies to this case, and that the plaintiffs, having separated themselves from the defendants, have for more than twelve years been to their own knowledge excluded from the joint family property, and that their suit to enforce a right to share therein is barred"—*Mahalinga* v. *Mariyamma*, I.L.R., 12 Mad., 462, distinguished.

APPEAL against the degree of S. Subbayyar, Subordinate Judge of South Canara, in original suit No. 41 of 1888.

The plaintiffs claiming to be members of an undivided Aliyasantana family with the defendants, prayed for a declaration to this effect, and for declarations that certain property referred to in the plaint was their joint family property, and that plaintiff No. 1 was the senior member of the family, and as such entitled to have the revenue registry of the lands changed into his name. The plaint further set out that Sanka Rai, who was the son of Akkamma, a member of the plaintiffs' branch of the family, had managed the property till his death in 1887 on behalf and by the consent of plaintiff No. 1. The defendants denied the various allegations in the plaint, alleged that the plaintiffs had never been in possession of the property in question, and pleaded that the suit was not maintainable as being for declarations only, and because other persons being interested in the claim should have been joined as plaintiffs, and also that it was barred by limitation.

The Subordinate Judge framed the following issues :—

(i) Are the plaintiffs and defendants members of an undivided Aliyasantana family ?

(ii) Are the plaint properties the joint family property of the said family ?

(iii) Did Sanka Rai referred to in the plaint manage the plaint lands on behalf of and with the consent of the first plaintiff ?

(iv) Were the properties Nos. 8, 9, 10, 16 and 17 the self-acquisition of the deceased Sanka Rai ?

(v) Whether Sanka Rai was managing the plaint lands on

MUTTAKKE v. THIMMAPPA.

behalf of and with the consent of the first plaintiff as stated in paragraph 2 of the plaint? And is the action barred by limitation?

(vi) Is the suit unsustainable for want of the permission referred to in section 30 of the Code of Civil Procedure in consequence of plaintiffs' omission to adopt the preliminary procedure prescribed by the said section?

(vii) Is the suit for a declaratory decree maintainable?

The Subordinate Judge recorded findings on all these issues in favour of the plaintiffs. With reference to the first and second he cited *Munda Chetti* v. *Timmaju Hensu*(1) and *Korapen Nayar* v. *Chenen Nayar*(2): with reference to the third he cited *Nambiatan Nambudiri* v. *Nambiatan Nambudiri*(3) and *Mahalinga* v. *Mariyamma*(4): as to the fifth he said "I have already stated that "the management of Sanka Rai must have been on behalf of the "*de jure* ejaman, who is the eldest among the plaintiffs; and if the "possession of the junior members is the possession of the ejamans, "there is manifestly no bar by limitation," and his judgment proceeded as follows:—

"If the decision in *Appasami Odayar* v. *Subramanya Odayar* (5) is applicable to "the case of Aliyasantana properties, it would appear that the omission of the plain- "tiffs' branch to take up the actual ejamanship when it came to their turn about "eighteen or twenty years ago on the death of Appa Rai would constitute laches; "but I do not think that clause 13 of section 1 of the Limitation Act XIV of 1859 "is applicable to Aliyasantana families; for it refers to a suit for a *share* of family "property not brought within twelve years from the date of the last *participation of* "*profits*. The right of an Aliyasantana member is a right to maintenance in the "family house and to the benefit enjoyment of the property so long as he remains "there—*Subbu Hegadi* v. *Tongu*(6). No share can be claimed in Aliyasantana "properties as declared by the judgment in *Munda Chetti* v. *Timmaju Hensu*(1) and "therefore the clause 13 is inapplicable. The said clause was further held to be "inapplicable to a suit brought for division after twelve years—*Subhaiyan* v. *San-* "*kara Subhaiyar*(7). The same remark applies to article 127 of the present Act "and the corresponding article of the previous Act.

"A suit for ejamanship, if regarded as a suit relating to a right to immoveable "property, would be barred by the rule prescribed in clause 12 of section 1 of Act "XIV of 1859, which prescribes twelve years from the date of the cause of action. "The cause of action to plaintiffs accrued when the defendants denied the plain- "tiffs' membership of the family in the Kudtala proceedings.

"The period of limitation prescribed by the present Act, article 42, and the "previous Act, article 143 is twelve years. The rulings under these sections con-

(1) 1 M.H.C.R., 380.
(2) 6 M.H.C.R., 411.
(3) 2 M.H.C.R., 110.
(4) I.L.R., 12 Mad., 462.
(5) I.L.R., 12 Mad., 26.
(6) 4 M.H.C.R., 196.
(7) 2 M.H.C.R., 347.

"template cases of possession and dispossession, in which case it had been held that "it was for the plaintiff to prove possession within twelve years.

"In cases falling under article 144 it has been held that nothing but hostile "possession in defendants for the period of twelve years accompanied by a denial "of the plaintiffs' rights made to plaintiffs' knowledge can constitute adverse posses- "sion—*Sayad Nyamtula* v. *Nana*(1), *Sarsuti* v. *Kunj Behari Lal*(2), *Karan Singh* v. "*Bakar Ali Khan*(3), *Dadoba* v. *Krishna*(4), *Chandmal* v. *Bachraj*(5). In one case "for thirty years there was admittedly no possession in plaintiff, and yet it was "held insufficient to create a bar—*Nilo Ramchandra* v. *Govind Ballal*(6). In another "case non-participation in profits was held insufficient to create exclusion. From "1863 to 1872 the plaintiff (a Government servant) did not participate—*Dinkar* "*Sadashiv* v. *Bhikaji Sadashiv*(7). The decisions in *Hansji Chhiba* v. *Valabh* "*Chhiba*(8) and *Kali Kishore Roy* v. *Dhununjoy Roy*(9) show that mere lapse of any "time would constitute no bar such as that contemplated by the Act of limitation. "Maintenance at the family house which an Aliyasantana man can claim cannot "be refused except after demand *Narayan Rao Ramchandra Pant* v. *Ramabai*(10) "followed in *Ramanamma* v. *Sambayya*(11) which overruled a former decision in "*Ajbakku* v. *Ammu Shettali*(12). Ejamanship, which admittedly accrued in 1872, "could not be barred, because the defendants did not profess to hold adversely. If "it is said that in 1859 hostile possession was asserted against a member of the "plaintiffs' branch to the plaintiffs' knowledge, a cause of action accrued, such "cause of action was only a cause of action to claim a share, which having been "subsequently declared not allowable, the plaintiffs cannot be found fault with. I "find this issue also in plaintiffs' favour.

"*Sixth Issue.*—The objection under section 30 of the Code of Civil Procedure "is untenable. The right claimed is not one that accrues to the whole of the "members of the plaintiffs' branch.

"*Seventh Issue.*—A declaratory suit is maintainable in such cases (vide *Tirumala-* "*thammal* v. *Venkataramanaiyan*(13). I find this last issue also in plaintiffs' favour."

Mr. *D'Rozario* and *Narayana Rau* for appellants.

Ramachandra Rau Saheb and *Fernandez* for respondents.

JUDGMENT.—This is a suit by certain persons claiming to be members of an undivided Aliyasantana family for a declaration (i) that plaintiffs and defendants are members of an undivided family, (ii) that plaintiff No. 1 is the senior member of the family, and as such entitled to get the kudtala, or revenue registry of the lands transferred to his name.

The defendants denied that the plaintiffs and defendants were members of an undivided Aliyasantana family, and that the property was joint family property, and asserted that for more than

(1) I.L.R., 13 Bom., 424.
(2) I.L.R., 5 All., 345.
(3) I.L.R., 5 All., 1.
(4) I.L.R., 7 Bom., 34.
(5) I.L.R., 7 Bom., 474.
(6) I.L.R., 10 Bom., 24.
(7) I.L.R., 11 Bom., 365.
(8) I.L.R., 7 Bom., 297.
(9) I.L.R., 3 Cal., 228.
(10) I.L.R., 3 Bom., 415.
(11) I.L.R., 12 Mad., 347.
(12) 4 M.H.C.R., 137.
(13) 2 M.H.C.R., 381.

MUTTAKKE v. THIMMAPPA.

a century the property had been in their exclusive possession, and that a declaratory suit would not lie.

The Subordinate Judge held that a declaratory suit was maintainable, and that the suit was not barred by limitation. These two points have been fully argued before us, and we are of opinion that the decision of the Subordinate Judge cannot be maintained.

The case on which the Subordinate Judge relied in support of his opinion that a declaratory suit would lie, *Chandu* v. *Chathu Nambiar*(1), is clearly distinguishable from the present case. That was a suit by the karnavan of a Malabar tarwad for a declaration that certain property was the common property of the tarwad, and that the plaintiff was entitled to transfer of the revenue registry of the land to his name. All that this Court decided was that, under the circumstances of the case, the plaintiff was entitled to a declaration that the property was the property of the tarwad, so that he might move the Revenue authorities to register his name. But the Collector would not have been bound to effect the transfer. He was no party to the suit, and, though, no doubt, he would respect the decree of the Court, he may have had reasons which would have justified him in refusing to comply with the application even when supported by the decree. Moreover in that case the status of the plaintiff as karnavan of the tarwad was not denied, the defendants relying on an alleged family custom that self-acquisitions of members did not on their death lapse to the tarwad. In this case the status of the plaintiffs as members of the family is denied. The plaintiffs have admittedly been for a long time living on their own "*anayatha*" property apart from the defendants, who had sole and undisturbed management and enjoyment of the plaint property. If, as is alleged by the plaintiffs, the plaintiff No. 1 is the *de jure* ejaman of the family, he is entitled to the possession and management of the family property, and a suit for mere declaration of his right will not lie.

The fifth issue as originally framed ran thus: "Were plaintiffs in possession or management within twelve years, and is the suit barred by limitation?" Subsequently the plaintiffs put in a petition praying that the issue might be amended so as to show that the question at issue was "when were the plaintiffs excluded from sharing the joint family property." The amendment was

(1) I.L.R., 1 Mad., 381.

opposed, but the Subordinate Judge amended the issue as follows: "Whether Sanka Rai was managing the plaint lands on behalf of and with the consent of the plaintiff No. 1 and is the action barred by limitation." He held that though Sanka Rai had no express permission to manage on behalf of any of the plaintiffs, yet a permission must be presumed by law and relied upon *Mahalinga* v. *Mariyamma*(1). The case is not in point, as it was not questioned there that the senior female was the *de jure* ejaman, and the only question was whether, according to the general Aliyasantana usage, the senior male excludes the senior member of the family when she is a female. In the circumstances of that case, it was, the Court held, rightly presumed that management was by the sufferance of the ejaman for the time being. We do not think that the learned Judges who decided that case intended to hold, as the Subordinate Judge appears to think, that no lapse of time can affect the rights of a person who claims to be the ejaman of an Aliyasantana family.

With reference to article 127 of the second schedule of the Limitation Act, the Subordinate Judge appears to hold that it is not applicable to the present suit, because no definite share can be claimed in Aliyasantana properties. No doubt it was decided in *Munda Chetti* v. *Timmaju Hensu*(2) that the Aliyasantana law does not allow compulsory division, but this is not a suit for a share, nor does article 127 refer to such a suit. What the plaintiffs really seek by the present suit is to enforce their right to share in joint family property. Assuming for the sake of argument that the property is joint family property, the defendants' pleader contends that the plaintiffs' have been excluded therefrom for a century. It appears to us that the only conclusion which can be come to upon the evidence is that the plaintiffs' branch long ago severed their connection with the defendants' branch. They have for the last fifty or sixty years lived apart on the property acquired by their paternal ancestors. There is no reliable evidence to show that they have, within the memory of the present generation, had any community of property with the defendants' branch. The evidence of the plaintiffs' witnesses as to visits paid to Pavur Gutta, cultivation work carried on there, and joint performance of ceremonies is vague, contradictory and unsatisfactory.

(1) I.L.R., 12 Mad., 462. (2) 1 M.H.C.R., 380.

MUTTAKKE v. THIMMAPPA.

We are not prepared to assent to the proposition laid before us by Mr. Ramachandra Rau Saheb that a member or a branch of an Aliyasantana family is, after complete separation from the parent branch for any number of years, entitled on demand to participate in the original property of the family. To entitle a person or a branch to retain their rights, the connection with the family must be kept up, either by exercise of the right to share in the joint-family property by joining in the *sacra*, by intermarriage or otherwise. In the present case the whole evidence points to separation or exclusion, or both. The right of the three branches into which Akkamma's family has become divided was admittedly denied so long back as 1859, and though the plaintiffs' branch purchased the rights of the excluded branch in the same year, they have never taken any steps to enforce the right. It is, however, argued that the right of the plaintiffs' branch has never been actually denied, and that in an Aliyasantana family the possession of one member being the possession of all, it must be held that the defendants had possession on behalf of the plaintiffs, and that such possession has never become adverse. It has been held by the Privy Council that article 144 of the Limitation Act only applies where there is no other article which specially provides for the case. But even if article 144 did apply to this case, we should hold that the possession of the defendants had long since become adverse to the plaintiffs, as it is evident that the defendants have held the land on their own behalf and not on behalf of the plaintiffs. But we are of opinion that article 127 applies to this case and that the plaintiffs having separated themselves from the defendants have, for more than twelve years, been to their own knowledge excluded from the joint family property and that their suit to enforce a right to share therein is barred.

We reverse the decree of the Subordinate Judge and dismiss the plaintiffs' suit with costs throughout.