

APPELLATE CIVIL.

Before Jai Lal and Abdul Rashid JJ.

MUSSAMMAT SHIBBI (PLAINTIFF) Appellant

versus

JODH SINGH (DEFENDANT) Respondent.

1933

May 9.

Civil Appeal No. 2657 of 1928.

Hindu Law—Maintenance of widow—Suit for—Limitation—Indian Limitation Act, IX of 1908, Articles 128, 129—Unchastity—Maintenance, a recurring right.

A suit by a widow against her stepson, for possession of certain property left by her deceased husband in lieu of maintenance or in the alternative for maintenance in the form of a cash allowance, was decreed by the trial Court to the extent of Rs. 400 *per annum* as maintenance. On appeal the District Judge held that the suit was barred by limitation under Articles 128 and 129 of the Limitation Act, and agreed with the trial Court that Rs. 400 *per annum* was the proper amount of maintenance, but decreed Rs. 10 *per mensem* on the ground that the defendant, when cross-examined as a witness, had agreed to pay this amount to the plaintiff. The plaintiff had previously instituted proceedings under Section 488, Criminal Procedure Code, which terminated on 25th February 1909 (*i.e.* more than 12 years before institution of the present suit), and as the husband had asserted that his wife was unchaste the Magistrate had declined to grant her maintenance.

Held, that Article 129 of the Limitation Act had no application to the present suit, as it was not one for any declaration of plaintiff's right to be maintained out of the estate of her husband, and also as the claim to maintenance in such cases is a recurring right, which may be in abeyance during the unchastity of the wife, and may revive on the cessation of this disqualification, and according to the findings of the District Judge the plaintiff was not unchaste at the time when she instituted the present suit, at any rate.

Sathyubbama v. Kesanacharya (1), and *Gopal Chandra Pal v. Kadambini Dasi* (2), followed.

(1) (1916) I. L. R. 39 Mad. 658. (2) 1924 A. I. R. (Cal.) 364.

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Moreover, Article 129 is intended to apply to cases where the status of a person on the basis of which maintenance is claimed is denied; in which case the suit to establish that status must be brought within 12 years from the date when the right is denied.

Held further, that the present suit was governed by Article 128 and was not barred by time.

Raoji v. Bala (1), and *Ratnamasari v. Akilandammal* (2), distinguished.

Second Appeal from the decree of Mr. G. C. Hilton, District Judge, Ambala, dated the 20th September, 1928, modifying that of Lala Suraj Narain, Senior Subordinate Judge, Ambala, dated the 27th February, 1928, and reducing the amount of maintenance from Rs. 400 to Rs. 120 per annum, etc.

BISHAN NATH, for Appellant.

J. N. AGGARWAL, for Respondent.

JAI LAL J.

JAI LAL J.—*Mussammat Shibbi* widow of Gurdit Singh instituted a suit against her step-son Jodh Singh for possession of one-third share in certain land left by her husband in lieu of her maintenance or in the alternative for a cash allowance by way of maintenance. This suit was defended on the grounds that it was barred by time, that the plaintiff was not entitled to maintenance because she was not chaste, that the plaintiff had waived her rights and that her husband had deprived her of such rights. The Senior Subordinate Judge held that unchastity had not been established, that the suit was not barred by time, that there was no waiver by the plaintiff of her rights and that there was no other obstruction in her way to obtain a decree for maintenance. He fixed Rs. 400 per annum as the proper amount of maintenance for the plaintiff and granted a decree for the amount due

(1) (1891) I. L. R. 15 Bom. 135.

(2) (1903) I. L. R. 26 Mad. 291.

to her at that rate from June 1928. This amount was charged on property mentioned in the judgment and decree of the Senior Subordinate Judge. From this decree the defendant appealed to the District Judge and repeated the objections which he had raised in his defence in the trial Court and the plaintiff filed cross-objections in so far as the decree awarded her maintenance from June 1928 and claimed that she should have been given maintenance from the date of the death of her husband.

An objection was raised before the District Judge that the cross-objections were not maintainable but was overruled. On the defendant's appeal the District Judge held that the suit was barred by time by virtue of article 129 of the Indian Limitation Act and also of article 128. He, however, agreed with the trial Court that unchastity of the plaintiff had not been proved and that Rs. 400 per annum was the proper amount of maintenance as fixed by the trial Court. At the same time he found that the defendant had already agreed to pay Rs. 10 per mensem as maintenance to the plaintiff to which in spite of the question of limitation she was entitled. He accordingly reduced the amount of maintenance to Rs. 10 per mensem payable from June 1928. Against this decree the plaintiff has lodged this appeal and the defendant has also filed an appeal so far as the decree for maintenance at Rs. 10 per mensem is concerned.

With regard to the defendant's appeal, it seems to me that the learned District Judge was in error when he granted a decree on the basis of the so-called admission by the defendant. A reference to the record shows that the defendant was examined as a witness and when he was cross-examined by the plaintiff's counsel he said that if so ordered by the Court he

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would be prepared to give Rs. 10 per mensem which was adequate for the maintenance of the plaintiff. He, however, did not abandon his objection to the right of the plaintiff to be maintained out of the estate of her husband or as to limitation. Under these circumstances, in my opinion, no decree on the so-called admission of the defendant should have been granted against him.

As to the appeal by the plaintiff I am of opinion that the view of the learned District Judge that the suit was barred under article 129 of the Indian Limitation Act is erroneous. In the first instance the plaintiff has not expressly claimed any declaration of her right to be maintained out of the estate of her husband, on the other hand her claim is for possession of immoveable property left by her husband or in the alternative for maintenance in the form of cash allowance to be fixed by the Court. Secondly, the District Judge has held that Article 129 operates as a bar in the way of the plaintiff by virtue of certain proceedings under section 488, Criminal Procedure Code, which were taken by the plaintiff against her husband in the Court of a Magistrate. Those proceedings terminated on the 25th February 1909 and as the husband had asserted that his wife was unchaste the Magistrate had declined to grant her maintenance. It was contended before the learned District Judge, and also before us, that this denial by her husband of her right to maintenance made it incumbent on her to establish her right within twelve years from the 25th February, 1909. The claim to maintain in such cases, however, is a recurring right which may be in abeyance during the unchastity of the wife and may revive on the cessation of this disqualification. There is authority in support of the proposition that it revives when the unchastity

ceases, e.g. *Sathyubhama v. Kesanacharya* (1). As remarked by the Calcutta High Court in *Gopal Chandra Pal v. Kadambini Dasi* (2), the cause of action for maintenance accrues from time to time according to the want and exigencies of the person entitled. In this case the learned District Judge has found that the plaintiff was not unchaste at the time when she instituted the suit at any rate. In fact his finding is that she never was unchaste.

Moreover it seems to me that Article 129 is intended to apply to cases where the *status* of a person on the basis of which maintenance is claimed is denied. The Article reads as follows:—

“By a Hindu for a declaration of his right to ‘maintenance,’ and the period provided is twelve years from the date when the right is denied.”

Raoji v. Bala (3) and *Ratnamasari v. Akilandam-mal* (4), cited by Mr. Jagan Nath on behalf of the respondent, do not appear to support him because it appears from an examination of these cases that the status of the respective plaintiffs had been denied and the suit in each case was *inter alia* to establish that status.

In view of the above discussion, I am of opinion that this suit was not barred by time and was governed by Article 128 of the Indian Limitation Act.

I would, therefore, accept the appeal by the plaintiff and, setting aside the decree of the District Judge, restore that of the Senior Subordinate Judge. This course is necessary because the plaintiff in her grounds of appeal has not claimed that she is entitled to maintenance from the date of the death of her husband as

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she had claimed in her plaint. She merely contested the finding of the District Judge that her suit was barred by time. The appellant will get her costs throughout against the defendant-respondent.

In view of the above it necessarily follows that the defendant's appeal becomes infructuous but it must formally be accepted. No order as to costs of that appeal.

ABDUL
RASHID J.

ABDUL RASHID J.—I agree.

N. F. E.

Appeal accepted.