1877.

KA'CHUBHA'I BIN GULAB-CHAND AND ANOTHER v. KRISHNA'BA'I KOM BA'BA'JI.

ceeded, as he said upon the evidence, to hold that the house was the house of Bábáji and not of Chimnáji, and, therefore, that the plaintiff was entitled to recover it. Having regard to his previous ruling that the partition-deed and secondary evidence of it were inadmissible, we must deem the District Judge as holding that, irrespectively of partition, Bábáji was entitled to the house. That, however, was making a totally different case for the plaintiff from that which she alleged for herself. She asserted a title founded on partition. The Judge conjectured and found a title irrespective of partition. This, we think, he was not at liberty to do. His judgment seems to have been a benevolent attempt on his part to discover a path for the bereaved plaintiff out of the provisions of section 91 of the Indian Evidence Act, and to relieve her from the consequences of the neglect of her husband to register the deed. We must reverse his decree, and restore that of the Subordinate Judge. The plaintiff must pay the costs of the suit and of the regular appeal. The parties, respectively, must bear their own costs of the special appeal.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Pinhey.

1878. June 11.

KALO NILKANTH (ORIGINAL DEFENDANT), APPELLANT, v. LAKSHMIBA'I KOM KALO NILKANTH (ORIGINAL PLAINTIFF), RESPONDENT.*

Suit for maintenance—Limitation—Act XIV. of 1859, *Section* 1, *Clauses* 14 *and* 16.

The provision of the Limitation Act of 1859, applicable to suits brought under that Act for maintenance not chargeable upon any estate, is clause 16 of section 1, which gives six years from the accruer of the cause of action. The cause of action in such cases does not arise until there has been a demand and refusal of maintenace.

THIS was a second appeal from the decision of W. Sandwith, District Judge of Dharwar, affirming the decree of A. M. Cantem, Subordinate Judge of the same place.

In appeal, the District Judge, among others, framed two issues, viz., whether plaintiff ever lived with defendant after coming to the age of puberty, and whether the claim for maintenance was

* Second Appeal, No. 253 of 1877.

1878.

KALO NILKANTH v. LAKSHMIBAI KOM KALO NILKANTH.

barred; and found in the negative on both of them. He applied the Limitation Act IX. of 1871, schedule 2, article 128.

Manekshâh Jehângirshâh for the appellant:—The Judge found that the plaintiff never lived with her husband. She has, therefore, no right to a separate maintenance. By Hindu law, a wife is only justified in leaving her husband's house and demanding a separate maintenance on the ground of his misconduct: *Mudvállápá* v. *Gursátáwá*.[1] But if she, without her husband's sanction, leave him and live with her mother, she has no right to separate maintenance: Shamachurn Sircar's Vyavastha-Darpana, p. 374, (2nd edn.) He is not bound to support her if she leave him without his consent: Steele on the Law and Custom of Hindu Castes, p. 171. Act IX. of 1871 does not apply to the case, but Act XIV. of 1859, section 1, clause 16.

There was no appearance for the respondent.

WESTROPP, C.J.:—It is not competent for this Court to re-open the question of co-habitation of the plaintiff and defendant, or of the continence of the plaintiff. Those are questions of fact disposed of by the Courts below. The District Judge has, on the point of limitation, erroneously applied Act IX. of 1871 to this cause, which was commenced in 1872 before that Act came into force. Section I, clause 14 of Act XIV. of 1859, is also inapplicable, as this is not a case of maintenance chargeable on any estate. The provision of that Act which is applicable, is section 1, clause 16, which gives six years from the accruer of the cause of action, and it does not accrue until there has been a demand and refusal. (See special appeal 1041 of 1864, and the note to vol. 2, West's Acts, p. 139.) No demand or refusal has been proved to have occurred prior to the bringing of this suit, which is in itself a sufficient demand, and the defence is a sufficient refusal.

We must, accordingly, on those grounds affirm the decree of the District Judge.

(1) S. A. No. 307 of 1872, decided by Sargent and Melvill, JJ., on the 14th January 1873.