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a person alive and in health on a certain day was alive a short time afterwards.

In my opinion, sections 107, 108 of the Evidence Act have made no difference in this statement of the law. In the present case if it were possible to draw an inference of fact, I should say that the little boy Bala, aged eight years, who ran away from home in 1877 must in all probability have died before September, 1878. There is no presumption in law that because he was alive in 1877, therefore he was alive in 1878. In this view of the case, defendants cannot, in my opinion, successfully contest plaintiff's claim under the document A; and plaintiff, therefore, is entitled to have the decree of the Assistant Judge reversed and that of the Subordinate Judge restored.

Decree reversed.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

FAKIRGAUDA (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGI (ORIGINAL DEFENDANT), RESPONDENT.*

1898.
April 22.

Husband and wife—Suit for possession of wife—Wife herself defendant—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 35—Restitution of conjugal rights—Demand and refusal—Continuing cause of action—Limitation Act (XV of 1877), Sec. 23.

Where a husband sued to recover possession of his wife, making the wife herself the defendant to the suit,

Held, it was in substance a suit for the restitution of conjugal rights, and article 35 of the Limitation Act (XV of 1877) applied.

The demand and refusal, which form the starting point for limitation under article 35, are a demand by the husband and refusal by the wife (or *vice versâ*) being of full age.

A positive refusal on the part of the wife to return to her husband is not essential to the husband's cause of action.

Quære—Whether in case of a refusal by a wife of full age to a demand made by her husband, that she should return to him, a suit by him for her recovery is barred under article 35 of Schedule II of the Limitation Act (XV of 1877), or falls within the purview of section 23 as based on a continuing cause of action?

* Second Appeal, No. 950 of 1897.

1898.

FA KIRGAUDA v. GANGI.

SECOND appeal from the decision of L. Crump, District Judge of Dhárwár (confirming the decree of Ráo Bahádur Gangadhar V. Limaye, First Class Subordinate Judge).

Suit by a husband to recover possession of his wife. The defendant was the wife herself. The parties were Lingáyats and resided in Dhárwár.

The defendant contended that she and the plaintiff belonged to different sects of the Lingáyat caste, and that there could be no lawful marriage between them.

The Subordinate Judge found that the defendant was not the lawfully married wife of the plaintiff, the parties belonging to the different sects of the Lingáyat caste, and there being no evidence of any custom sanctioning such marriages. He also held that the claim was time-barred under articles 34 and 35, Schedule II of the Limitation Act (XV of 1877).

The plaintiff appealed, but the Judge (T. Hamilton) summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff preferred a second appeal, and the High Court reversed the decree and remanded the case. See I. L. R., 22 Bom., 277.

On the remand the Judge found that the suit was barred by limitation, and he confirmed the decree of the Subordinate Judge.

The plaintiff preferred a second appeal.

Dhondu P. Kirloskar appeared for the appellant (plaintiff):—The suit is not barred. The Judge applied article 34, Schedule II, of the Limitation Act. We submit that neither article 34 nor article 35 are applicable. This is not a suit for the restitution of conjugal rights; it is a suit for the institution of such rights. Article 34 applies to a suit for the recovery of a wife who is in the possession of a third person.

If the Limitation Act applies to such a case as this, section 23 of the Act applies, the case being one of continuing wrong—*Hemchand* v. *Shiv*[1]; *Bai Suri* v. *Sankla Hirachand*[2]; *Binda* v. *Kaunsilia*[3].

(1) P. J., 1883, p. 124. (2) (1892) 16 Bom., 714.
(3) (1890) 13 All., 126.

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The defendant relied on the defence of limitation. The burden, therefore, lay on her to prove that there was no demand and refusal within two years of the institution of the suit.

Sadashiv R. Bakhle appeared for the respondent (defendant) :— Both the lower Courts have held that there was no demand and refusal. Therefore, the suit was rather premature than time-barred. In our written statement there is an allegation that there was repudiation on our part immediately after the marriage.

Next we contend that the suit is governed either by article 34 or article 35 of the Limitation Act, and it was incumbent upon the plaintiff to prove demand and refusal within two years of the suit. For the purpose of the Limitation Act no distinction can be drawn between a suit for restitution of conjugal rights and one for institution of such rights. As to the general right of a Hindu to claim back his wife, we submit that the right can only be exercised after demand and refusal. Having regard to article 35 we contend that the suit is premature, there having been no demand and refusal and consequently there was no cause of action. The plaintiff may make a fresh demand and institute a fresh suit.

PER CURIAM :—We are unable to agree with the District Judge in this case that the suit is barred by limitation. It is a suit by the plaintiff, who alleges that he is the husband of the defendant, in which he seeks to recover possession of his wife, the defendant herself. It is a peculiar mode of stating the relief to which, if his allegations are true, the plaintiff would be entitled. The woman could not well be ordered to give possession of herself to the plaintiff. That is the appropriate remedy when the defendant is a third party who has the wife under his control. The appropriate form of decree in this case would be one which after making a proper declaration directs the defendant to go to the plaintiff's house—*Furzund Hossein* v. *Jaun Bibee*[1].

The suit is, however, we think, in substance a suit for the restitution of conjugal rights, and article 35 of the schedule to

(1) (1878) 4 Cal., 588.

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the Limitation Act is the article which is appropriate to it. The District Judge has held that the suit is barred, because the defendant and some of her witnesses have deposed to a demand and refusal six or seven years ago, but the demand and refusal to which they refer took place when the defendant was a minor of the age of fifteen or sixteen years. The demand and refusal, which form the starting point for limitation under article 35, are a demand by the husband and refusal by the wife (or *vice versâ*) being of full age. A refusal by the wife when a minor does not cause the statute to commence to run. That being so, the demand and refusal deposed to on behalf of the defendant must be eliminated from consideration for the purposes of limitation. The defendant appears to have attained majority about two years before the suit. She was about 21 when she gave her evidence in November, 1894. The suit was first filed on the 9th August, 1893. It is, therefore, clearly not time-barred.

Before us it is contended that the suit is premature, as no demand and refusal have been proved. No cause of action, therefore, it is said, has accrued to the plaintiff. The English Courts in suits of this kind require that there shall be a demand by the husband upon the wife to return to cohabitation before a petition is presented for restitution of conjugal rights. That is under a rule of Court (Rule 175): see Browne and Powles on Divorce, p. 135. There is no such rule of Court here, but the Limitation Act appears to recognize the necessity of a husband asking his wife to join him, or to return to his house before he can file a suit to compel her to do so. Assuming that to be the law, there is evidence here, which apparently the District Judge does not disbelieve, that the plaintiff called on the defendant to return to him two years before the witness, (Exhibit 31), gave his evidence, which would be about a year before suit. A positive refusal on the part of the wife cannot be essential to the husband's cause of action. She might always return evasive answers to his demands or silently ignore them. Here there is no doubt as to the position taken up by the defendant. She has always alleged, and still alleges, that the plaintiff's marriage with her is invalid and that she is not his wife, and she refuses, therefore, to live with him. We cannot doubt that this state of

affairs discloses a cause of action—*Dadaji* v. *Rukmabai*[1]; *Binda* v. *Kaunsilia*[2]; *Bai Sari* v. *Sankla Hirachand*[3].

We do not wish to express an opinion as to whether, if the defendant had been of full age when the demand and refusal deposed to by the defendant's witnesses took place, a suit by the plaintiff would have been absolutely barred, nor as to whether section 23 of the Limitation Act applies to such a case as this. The question apart from the authorities, appears to us to be one of doubt and difficulty.

Decree reversed and appeal remanded for retrial. Costs, costs in the cause.

Decree reversed and case remanded.

(1) (1886) 10 Bom., 301. (2) (1890) 13 All., 126.
(3) (1892) 16 Bom., 714.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

RAJARAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* BANAJI MAIRAL (ORIGINAL DEFENDANT), RESPONDENT.*

1898. *June* 20.

Limitation Act (*XV of* 1877), *Art.* 179, *Cl.* 4—*Step in aid of execution—Application for return of a copy of a decree.*

An application to the Court by a decree-holder asking for the return of the copy of a decree filed with a former darkhást is not a step in aid of execution within the meaning of article 179 (4) of the Limitation Act (XV of 1877).

SECOND appeal from the decision of C. H. Jopp, District Judge of Poona.

Plaintiff and defendant were owners of two adjoining houses. On the 20th June, 1892, the plaintiff obtained a decree directing the defendant to remove certain work which he had done upon the plaintiff's wall, and restraining him from doing any new work thereon, or causing any obstruction to the plaintiff in repairing the wall.

On the 20th January, 1894, the plaintiff presented his first darkhást for execution of the decree. Notice under section 248

* Second Appeal, No. 72 of 1898.