Appellate Jurisdiction (*a*)

Special Appeal No. 309 *of* 1868.

ABBAKKU and another.....*Special Appellants.*

AMMU SHETTATI.....*Special Respondent.*

The plaintiff sued the defendants for future and past maintenance and obtained a decree for future maintenance and for arrears of maintenance for seven years. The parties were governed by the Aliyasantana law. It was found by the Lower Appellate Court that for twenty years before the suit the plaintiff lived apart from the defendants and the other members of the family and supported herself without receiving or applying for anything towards her maintenance out of the family property in the possession of the defendants or obtaining any recognition of her right to maintenance.

On special appeal *held*, per *Scotland, C. J.* That assuming the Aliyasantana law recognizes the right of the plaintiff to enforce separate maintenance as a charge upon the estate, the plaintiff's claim was barred by Section 1, Clause 13 of Act XIV of 1859.

Per *Collett, J.* It is doubtful whether Section 13, which applies to cases where the right to receive maintenance is a charge on the inheritance of any estate, applies in a case where the right of the plaintiff is said to exist by reason of her being a co-proprietor with the defendants. If the suit be not within Section 13, then it was one to recover an interest in immoveable property and was equally barred by Clause 12 of Section I of the Limitation Act.

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THIS was a Special Appeal against the decision of the Honorable J. C. St. Clair, the Acting Civil Judge of Mangalore, in Regular Appeal No. 41 of 1867, modifying the decree of the Court of the Principal Sadr Amin of Mangalore in Original Suit No. 78 of 1864.

Parthasárathi Aiyangár, for the Special Appellants, the 3rd and 4th defendants.

This Special Appeal coming on for hearing, the Judges delivered the following Judgments.

SCOTLAND, C. J.—The plaintiff in this case is the sister of the 1st and 2nd defendants, and the 3rd and 4th defendants are her nieces, and she has obtained the decree of the Civil Court of Mangalore in an appeal from the Principal Sadr Amin's Court for the payment by the 2nd, 3rd, and 4th defendants of an annual sum for her future separate maintenance, and an amount on account of arrears of maintenance for seven years. The 3rd and 4th defendants have appealed against that decree and

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relied on the single ground that the Act of Limitation (Act XIV of 1859, Section 1, Clause 13,) is a bar to the suit.

The material facts are that the plaintiff and the defendants are members of a family governed by the Aliyasantana law, and for at least twenty years before the suit the plaintiff has lived apart from the defendants and the other members of the family, and has during that time supported herself without receiving or applying for anything towards her maintenance from the family property in the defendants' possession or obtaining any recognition of her right to maintenance. The Principal Sadr Amin decided in favor of the plaintiff, considering that evidence of a demand of maintenance and a refusal to pay shewing adverse possession by the defendants of the family property was necessary to bring the case within the Act; and the Civil Judge rests his decision, modifying the decree of the original Court, on rulings which he states lay down that no lapse of time can affect the right to maintenance except in regard to the recovery of arrears.

Now assuming that the Aliyasantana law recognizes the right of the plaintiff to enforce separate maintenance as a charge on the estate, (a point on which I do not intend to convey any opinion), I think that both Courts have come to a wrong decision on the Limitation Act. The 13th Clause of Section 1 of Act XIV of 1859 applies generally to suits for the recovery of maintenance chargeable on the inheritance of an estate, whether the claim be for past or future maintenance, and it prescribes the times from which the period of limitation is to be computed, namely, "from the death of the person on whose estate the maintenance is alleged to be a charge, or from the date of the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management of such estate on account of such maintenance." There is nothing in the language of this enactment to require that the person in possession or management of the estate should be shewn to have expressly repudiated the claim of the plaintiff. It makes the period of limitation begin to run immediately on the death of the person whose estate

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is alleged to be chargeable, or, when there has been a recognition of the claim by payment, from the date of the last payment. I read the clause as requiring exclusive enjoyment of the estate as respects the interest of the person claiming maintenance, that is separate possession or enjoyment without recognition of any existing interest or right in the claimant for twelve years computed from either of the events mentioned in the clause. This, I think, is sufficient to constitute the bar, although the claimant may throughout the period have abstained from demanding an allowance for maintenance; and in the present case it is clearly found that the defendants have had such a possession and enjoyment of the family property.

We have not been furnished with a reference to either of the rulings relied upon by the Civil Judge, and the only reported decision that I know of bearing on the law of limitation in a case of maintenance is *Venkopadhyaya* v. *Kávari Hengusu*, 2, *Madras High Court Reports*, 36, but that is no authority for the position enunciated by the Civil Judge. The bar of the Act appears not to have been a point for decision in the case, and all that I understand the Court to have laid down is that lapse of time short of the period allowed by the Act of Limitation is not a bar to the recovery of past maintenance.

I am therefore of opinion (that assuming the right as claimed to exist) the suit is barred by the Act of Limitations, and that the decree appealed from must be reversed with costs.

COLLETT, J.—The circumstances of this case appear to me to be peculiar. The plaintiff is a member of a family governed by Aliyasantana law, and sues her two sisters and the two daughters of one of the sisters for separate maintenance. She is therefore in the position of a proprietor suing her co-proprietors for maintenance. The Court of First Instance found upon the evidence that she had the joint interest claimed by her. The Lower Appellate Court came to the same conclusion, but upon a process of reasoning entirely erroneous and not upon the evidence. Assuming, however, the fact of the plaintiff being a co-pro-

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prietor with the defendants, and assuming also (what however I do not in the least wish to be taken as deciding) that the plaintiff has a right to a separate maintenance to be charged upon and derived in some way from or out of the joint property, the question remains whether her remedy for such a right has not been barred by the lapse of time; and if so, that will be sufficient for the disposal of this special appeal.

Now the finding by the Court of First Instance as to the facts would not, in my opinion, have been sufficient for the decision of this question. That Court expressly rejected the evidence that the plaintiff had been living separately from the defendants for more than thirty years, and did not find for how long and under what circumstances the plaintiff had been living separately, and whether there had been such a possession by the defendants as to be exclusive of the plaintiff. The Court assumed that the plaintiff being a co-proprietor there must have been an express demand and refusal to constitute the defendants' possession hostile. In deciding whether a case is within the latter part of clause 13 of Section 1 of the Act of Limitation the nature of the defendants' possession or management will have to be considered, and it will always, I consider, be a question upon the evidence and the circumstances of the case, whether in the case of a co-proprietor there has been a continuing, actual or constructive possession by the plaintiff jointly with the defendant, or whether the ostensible possession or management of the defendants has in fact been exclusive of and hostile to the plaintiff; and of course such exclusion of the plaintiff may be evidenced in a variety of ways besides by an express demand and refusal. Had the case rested upon the finding of the Court of First Instance, there must have been a remand for a more distinct finding as to the facts. But the Lower Appellate Court has recorded a distinct finding upon this part of the case. The words of the Judgment are:—"It has no doubt been proved that the plaintiff has lived apart from the defendants' family for the last twenty years, and has during that time received no assistance out of the family funds;" but the Court for a reason which

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I agree is clearly erroneous law held that notwithstanding this exclusion of the plaintiff (for clearly the Court by the facts as above found meant that there had been such an exclusion of the plaintiff,) the law of limitation would apply only to the recovery of arrears of maintenance. That is not so clearly, for clause 13 is not concerned with the recovery of arrears due to a co-proprietor or to one having a right to maintenance out of an estate, but with the enforcement of the right itself to a share or to maintenance.

I have dealt with this case on the footing that it is within clause 13; but I entertain great doubt if it is so. It is not a suit for the recovery of a share, for under the special law of the parties it is settled law that no such right exists. And in respect to suits for maintenance, clause 13 is expressed to be limited to "where the right to receive such maintenance is a charge on the inheritance of any estate" an inexact phrase in which a right seems to be substituted for its object matter. Now in this case the right of the plaintiff to receive maintenance (if she has such a right) is not of the nature of "a charge on the inheritance of an estate;" it is not a right of one person to receive a maintenance chargeable on the inheritance of an estate by another person, but it is a right said to exist by reason of her being, and inherent in her joint interest as, a co-proprietor with the defendants to receive a maintenance out of the joint property, and this seems to me quite another kind of right. But if the suit is not within clause 13, then, if the plaintiff's right be as described a part of her proprietory interest in the joint estate, and enforceable as such, it seems to me that it must be an interest in immoveable property within the terms of clause 12, and if so as the cause of action in respect to such interest would arise when the exclusion began and that was twenty years ago, the suit is clearly barred. I agree therefore in reversing the decrees below and in dismissing plaintiff's suit with costs throughout.

Special Appeal allowed.