APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

CHANDU AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

1889. December 17.

v.

SUBBA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Aliyasantana Law—Qualification of ejaman—Leprosy.

The last female member of an Aliyasantana family made an adoption without the consent of her son, who was suffering from ulcerous leprosy, which was not congenital:

Held, the son was entitled to have the adoption set aside.

SECOND APPEAL against the decree of the District Judge of South Canara in appeal suit No. 114 of 1887, affirming the decree of the District Munsif of Karkal in original suit No. 3 of 1886.

The parties to this suit were governed by the Aliyasantana law. Defendant No. 1 was the mother of the plaintiff and had adopted defendant No. 2 and executed a karar in her favour without the consent of the plaintiff, who was a leper. Defendant No. 3 was the natural mother and guardian *ad litem* of defendant No. 2. The plaintiff now sued to set aside the adoption and the karar.

The District Munsif passed a decree in favour of the plaintiff, and his decree was affirmed on appeal by the District Judge.

Defendants Nos. 2 and 3 preferred this second appeal.

This second appeal having come on for hearing before Kernan and Shephard, JJ., their Lordships made an order directing the trial of (1) an issue as to the truth of a genealogical tree of the family, filed with reference to an allegation in the plaint that there were four male and three female members of the plaintiff's family besides himself and defendant No. 1, and (2) an issue as to the form of leprosy with which the plaintiff was afflicted.

Upon the above issues, the District Judge returned findings as follows:—(1) that the plaintiff had failed to prove the allegation above referred to, and (2) that the leprosy was not congenital, and

* Second Appeal No. 1362 of 1888.

CHANDU v. SUBBA.

that while the two types of leprosy are often mixed and both result in ulcers, in the present case the ulcerous (non-tubercular) type seemed predominant.

This second appeal then came on for re-hearing before Muttusami Ayyar and Shephard, JJ.

Narayana Rau for appellants.

Ramachandra Rau Saheb and *Subba Rau* for respondents.

JUDGMENT.—The finding on the two issues, remanded for trial which we accept, makes it necessary to decide the question whether the plaintiff's leprosy deprives him of his right to question the adoption made by his mother, the defendant. That the plaintiff as son of the defendant would, but for his disease, have, under the Aliyasantana system, the right claimed by him there can be no doubt. It was held by the late Sudder Court in *Colay Hegaday* v. *Manjoo Kumpty*(1) that the last female member of an Aliyasantana family having a son cannot, without his consent, make a valid adoption. In the present case it is found as a fact that there is no custom in South Canara excluding lepers either from management or from inheritance. But it is argued that, apart from custom, a leper is disqualified under the Aliyasantana system in the same way as he is under Hindu law. The appellants' vakil, being unable to refer to any distinct authority in support of the position, argues that in the nature of things a leper is not a fit person to act as ejaman, and cites a Malabar case in which a blind man was considered unfit to hold the office of karnavan—*Kanaran* v. *Kunyan*(2). We do not think it was intended to lay down as a matter of general law that blindness is always a disqualification for karnavanship. But apart from that, we are unable to see why a physical infirmity which unfits a man to be karnavan should further deprive him of other rights attached to the status which he enjoys in the family. The question is one of Aliyasantana usage, and in the absence of any authority warranting the adoption by the first defendant during the plaintiff's life time, we are not at liberty to sever from his status one of its legal incidents, viz., the right to bar an adoption by his mother. The Hindu law cannot be extended to the Aliyasantana usage by analogy, especially as it rests on special conventional grounds so far as it relates to disqualified heirs. It must also be observed that

(1) Sudder Decisions, 1859, p. 138. (2) I.L.R., 12 Mad., 307.

the leprosy in the case before us was not congenital, and even if the Hindu law could be extended to the case, it is not applicable on the facts found.

We do not consider that the appeal can be supported, and must, therefore, dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

SANKUMANI (PLAINTIFF), APPELLANT,

v.

IKORAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889. October 24.

Jurisdiction by consent—Waiver of want of jurisdiction—Civil Procedure Code, s. 25, order made under, without notice to the party not applying.

A suit for land was filed in 1883 in the Subordinate Court of Cochin. In 1884 the Government, by a notification under Act III of 1874, transferred the district where the land was situated from the jurisdiction of that Court to that of the Subordinate Court of Calicut, whereupon the plaintiff applied to the District Court to transfer the case to the file of the first-mentioned Court under s. 25 of the Code of Civil Procedure. The District Judge granted the application without notice to the defendants. The defendants went to trial, and also preferred an appeal against the decree, which was passed in favour of the plaintiff, without objection to the jurisdiction of the Court.

In execution of the above decree, (which was affirmed on appeal) the plaintiff was obstructed. He, therefore, filed the present suit against the obstructors under the provisions of s. 331 of the Code of Civil Procedure, and they pleaded that the decree sought to be executed had been passed without jurisdiction:

Held, (1) that the want of notice to the defendants of the application made under s. 25 of the Code of Civil Procedure was immaterial;

(2) that the defect, if any, of the jurisdiction of the Court passing the decree had been waived by the defendants, and that the present defendants were precluded from availing themselves of it.

APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 259 of 1888, reversing the decree of E. K. Krishnan, Subordinate Judge of Calicut, in original suit No. 24 of 1887.

The plaintiff obtained a decree for possession of certain land

---

* Second Appeal No. 468 of 1889.