SULIMAN SAIB v. HASSON.

SANKARAN NAIR AND OLDFIELD, JJ.

"the cause of action was the denial of the plaintiff's right to the property accruing on the death of Sellathammal, and Sreenivasa taking possession of the property on the strength of the order of the authorities though he claimed that such order of the Government and the action taken under it should not affect his title nor the possession he had by virtue of the leases." So, the plaint in the first suit disclosed the fact that the plaintiff had been deprived of actual possession. He should have therefore claimed possession. The learned Judges also refer to the judgment of the Judicial Committee in *Chand Kour* v. *Partab Singh*(1) to the effect that the cause of action refers entirely to the grounds set forth in the plaint.

We are of opinion therefore that the decrees of the lower Courts should be set aside, and the Munsif be directed to restore the suit to his file and dispose of it according to law. Costs will be provided for in the final decree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. March 20 and 28.

KAYAROHANA PATHAN (PLAINTIFF), APPELLANT,

v.

SUBBARAYA THEVAN AND ANOTHER (DEFENDANTS NOS. 2 AND 10), RESPONDENTS.*

Hindu Law—Inheritance—Leprosy, anaesthetic, not a ground of exclusion from—Incurability, not a safe test—Grounds of exclusion in texts, some obsolete.

Under the Hindu Law a person suffering from the anaesthetic form of leprosy, though considered incurable by medical men, is not disentitled to inherit.

Obiter :—Both under the Hindu Law texts and the decided cases it is only the agonizing, sanious or ulcerous type of leprosy that is a disqualification to inherit.

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(1) (1889) I.L.R., 16 Calc., 98.

* Second Appeal No. 695 of 1912.

Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease are the tests for exclusion from inheritance.

Janárdhan Pándurang v. *Gopál Pándurang* et al (1868) 5 B.H.C.R., (A.C.J.), 145, *Ananta* v. *Ramabai* (1877) I.L.R., 1 Bom., 554, *Rangayya Chetti* v. *Thanikachalla Mudali* (1896) I.L.R., 19 Mad., 74 and *Helan Dasi* v. *Durga Das Mandal* (1908) 4 C.L.J., 323, distinguished.

Ranchod v. *Ajoobai* (1907) 9 Bom., L.R., 1149, referred to.

Many of the grounds of exclusion referred to in the texts would not now be enforced by the Courts and are practically obsolete.

SECOND APPEAL against the decree of J. S. GNANIYAR NADAR, Temporary Subordinate Judge of Negapatam, in Appeal No. 708 of 1910, preferred against the decree of G. J. QUARISHI, the Acting District Munsif of Tirutturaipundi, in Original Suit No. 113 of 1909.

The following facts are taken from the Lower Appellate Court's judgment:—

"The plaintiff in the suit which gave rise to this appeal, is the sister's son of one Viraswami Pathan. The first defendant is Viraswami's paternal uncle's son who is suffering from leprosy. The plaintiff claims Viraswami's properties with mesne profits alleging that the first defendant is not entitled to the properties on account of his being a leper . . . The District Munsif gave a decree for the plaintiff.

"The points for determination are:—Whether the first defendant is disqualified from inheriting Viraswami's properties on account of his leprosy?

"Though the first defendant denied in his written statement that he was a leper, there can be no doubt that he is suffering from leprosy. He himself has admitted in his evidence that his fingers have become shortened and black though he states that he is suffering from syphilis only. Major E. H. Wright, I.M.S. (Plaintiff's Witness No. 1), proves that the first defendant is suffering from nervous leprosy and that the disease is incurable. According to the witness the leprosy the first defendant is suffering from, is the anaesthetic form of leprosy and it is in the medium stage. The question is whether the first defendant is disqualified under these circumstances from inheriting Viraswami's properties . . . Incurable leprosy in a mild form does not entail forfeiture of rights . . .

KAYAROHANA PATHAN v. SUBBARAYA THEVAN.

"The decree of the Court is reversed and the suit dismissed with costs in this Court and in the Lower Court."

Plaintiff preferred this Second Appeal.

C. S. Venkatachariar for the appellant.

C. V. Ananthakrishna Ayyar for the respondents Nos. 2 and 10.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The question for decision in this Second Appeal is whether the defendant is disentitled to inherit his paternal uncle's son's estate by reason of his suffering from leprosy. The plaintiff is the sister's son of the deceased owner. The medical evidence is that the defendant is suffering from the anaesthetic form of leprosy and that it is in the medium stage. The District Munsif decided against the defendant on the ground that according to the opinion of the medical witness the disease was incurable. The Subordinate Judge held that the defendant was not excluded, because the disease was not of the sanious or ulcerous type and was not virulent and he was not regarded as unfit for association by his castemen. The Mitakshara, which is the predominant authority applicable in this presidency, does not expressly mention leprosy as a ground of exclusion from inheritance. It states "An impotent person, an outcaste, and his sons, one lame, a madman, an idiot, a blindman, and persons afflicted with an incurable disease and others (similarly disqualified) must be maintained excluding them, however, from participation." Mitakshara, ch. II, s. 10, pl. 1. Placitum 6 states with regard to the persons enumerated in pl. 1. "That is they are debarred of their shares, if their disqualification arose before the division of the property. But one, already separated from his co-heirs, is not deprived of his allotment." Placitum 7 provides "if the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect, on the same principle on which when the sons have been separated, one, who is afterwards born of a women equal in class, shares the distribution, is based." Of the Smrithi writers the only one who expressly excludes a leper is Devala. Manu excludes one who is a Nirindriya, that is devoid of an organ, after expressly mentioning eunuchs and outcastes, one born blind or deaf, an insane, an idiot and a dumb man, but a leper is not referred to by him (see Buhler, chapter IX, sloka 201). Apastamba and Vasishta do not exclude him. Narada excludes persons

afflicted with a chronic or acute disease (see 'Sacred Books of the East,' volume 33, page 194) or as otherwise translated an acute or agonizing distemper. Atrophy or pulmonary consumption is instanced as a chronic and leprosy as an acute, disease in the Ratnakara. Yajnavalkya and Vishnu exclude persons suffering from an incurable disease. So far as leprosy is concerned, the later Hindu Law books generally lay down, that to be a ground of exclusion, it must be of the sanious or ulcerous and not of the anæsthetic type. See *Janardhan Pandurang* v. *Gopal Pandurangetal* (1), *Ananta* v. *Ramabai*(2) and *Rangayya Chetti* v. *Thanikachalla Mudali*(3). The ancient texts apparently base the exclusion on the ground of the incapacity of the sufferer to perform the funeral and other obsequial rites of the deceased. The texts relate in terms to the right to partition on the distribution of an estate amongst several sons of a deceased owner; and the Mitakshara expressly provides that the share of the excluded sufferer should be restored to him if he is subsequently cured. It may be doubted whether the rule of exclusion would apply to a case of strict inheritance, as a person who is once excluded from inheritance, which consequently vests in another, is not entitled to claim it again subsequently. All the reported cases on the subject, *Muthuvelayuda Pillai* v. *Parasakthi*(4), *Ananta* v. *Ramabai*(2), *Rangayya Chetti* v. *Thanikachalla Mudali*(3) and *Helan Dasi* v. *Durga Das Mandal*(5) relate to the right to partition. In *Ranchod* v. *Ajoobai*(6), the question was one of inheritance proper. The leprosy in that case was held to be of the anæsthetic type, and it was held that the sufferer was not excluded. The question whether the texts were applicable to a case of real inheritance was not raised at the arguments in the case. The precedents cited in West and Buhler's Digest of Hindu Law also refer to cases of partition. In one case the Pandit was asked whether the nephew of a deceased person was entitled to the certificate of heirship in preference to his son who was insane. In his answer he expressly referred to the fact of the son and nephew being united in interest as the ground for

(1) (1868) 5 B.H.C.R. (A.C.J.), 145. (2) (1897) I.L.R., 1 Bom., 554.
(3) (1896) I.L.R., 19 Mad., 74. (4) (1860) Madras Sudder Decisions, 239.
(5) (1906) 4 C.L.J., 323. (6) (1907) 9 Bom.L.R., 1149.

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holding that the nephew was entitled to preference. It cannot, however, be denied that the texts have been applied to the right of inheritance in the case of blindness and dumbness although not in the case of leprosy. It must be noted that the ancient writers excluded various other persons from inheritance to the paternal estate along with those specifically enumerated in the Mitakshara. The author refers to them by the expression "others similarly disqualified." How wide the reasons for exclusion were will appear from Colebrooke's Digest, volume 2, pages 424 to 435. Many of the grounds of exclusion would not now be enforced by the Courts, and are practically obsolete. See Mayne's Hindu Law, paragraph 592, and *Vedanayaga Mudaliar* v. *Vedammal*(1). In *Venkata Subba Rao* v. *Purushottam*(2) BHASHYAM AYYANGAR and MOORE, JJ., abstained from expressing an opinion on the question whether lameness was a ground of exclusion, although a "pangu" is expressly named by Yajnavalkya amongst excluded persons. Sir Thomas Strange refers to the opinion of Colebrooke that all the texts of exclusion cannot be said to have been abrogated or to be obsolete, although the courts would not go into proof of several of them, such as the claimant being addicted to vice or profusion or being guilty of neglect of obsequies and duties towards ancestors. "But" Colebrooke observed, "expulsion from caste, leprosy, and similar diseases, natural deformity from birth resulting from an uncanonical marriage, would doubtlessly now exclude; and, I apprehend, it would have to be so adjudged in our Adawluts." (See Strange's Hindu Law, volume I, page 159.) It is doubtful how far the injunctions contained in the books are now actually enforced in different parts of the country. In Steel's Law of Castes it is observed that the rules of exclusion are largely qualified by custom, and that in seventy-two castes at Poona it was found that insanity excluded only unmarried persons, and that in eighty-three castes blind persons married and having families might inherit. In *Bai Amrit* v. *Bai Manik*(3) a boy bordering on idiocy was allowed to transmit a heritable right to his widow. (See West and Buhler's Digest, Introduction, page 155.)

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(1) (1903) I.L.R., 27 Mad., 591 at p. 598. (2) (1903) I.L.R., 26 Mad., 133.
(3) (1875) 12 B.H.C.R., 79.

Again there is a difference of opinion amongst Hindu writers whether the disability to inherit could not be removed by the performance of expiatory ceremonies. According to some authors, expiation, though productive of spiritual benefit, would not in cases of major sins and serious diseases indicative of such sins, render the sufferer fit for social intercourse or to inherit. This was the view taken in Bengal Sudder Adalat Decisions, volume 2, page 108, referred to in the Vyavasthachandrika, volume 2, Precedents, page 492. But others are of a different opinion. These considerations would have to be borne in mind, if we had to pronounce a definite decision on the question whether in a case of inheritance proper leprosy of the sanious or ulcerous type would be a ground of disqualification in this Presidency at the present day; but it is not necessary to do so, as the finding is that the defendant in this case is not suffering from leprosy of that type. It is contended for the appellant that, as according to the medical opinion the disease is incurable, the case is one which falls within the text of the Mitakshara; but the question is not whether according to modern medical opinion the disease is curable, though of the anæsthetic type. Both the texts of the Hindu Law and the decided cases fully establish that it is only the agonizing sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion. It may be that it is only that type that was regarded as incurable by the Hindu writers. It is not safe to adopt the test whether the disease is curable or not. That is very much a matter of opinion, on which the medical profession itself might be divided. The test would moreover be an indefinite one for legal purposes, as what is at one time regarded as curable may at other times be regarded as incurable. Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test. The result is that we must dismiss the Second Appeal with costs.