

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice
Venkatasubba Rao.

1922,
May 5.

H. SHINAPPAYA (DEFENDANT), APPELLANT,

v.

RAJAMMA *alias* PADMAVATHI (PLAINTIFF), RESPONDENT.*

Hindu Law—Husband's leprosy—Wife living apart, entitled to separate maintenance.

The wife of a Hindu who is suffering from virulent leprosy, is entitled to live apart from him and claim separate maintenance.

SECOND APPEAL against the decree of K. GOPALAN NAYAR, Subordinate Judge of South Kanara, in Appeal Suit No. 61 of 1921 (Appeal Suit No. 304 of 1920 on the file of the District Court), preferred against the decree of S. NARASINGA RAO, District Munsif of Mangalore, in Original Suit No. 356 of 1919.

Plaintiff instituted this suit to recover from the defendant, her husband, personally and by the sale of plaintiff mentioned properties, Rs. 274 due on account of maintenance for 6 years prior to the suit (1913 to 1919). The defendant pleaded that he was willing to maintain his wife in his house, and that she was not entitled to live away from him and to claim maintenance. The plaintiff answered that since 1913 the defendant was suffering from virulent leprosy, that she was therefore obliged to live separately from him from that year and that the defendant unjustly refused to give her maintenance.

Both the lower Courts found the facts as stated by the plaintiff and gave a decree to her as prayed for. The defendant preferred this Second Appeal.

* Second Appeal No. 1244 of 1921.

K. Yegnanarayana Adiga for appellant.—The leprosy was not of a virulent form. Even if it be, it does not entitle the wife to claim separate maintenance. There is no decided case or text actually covering the point. *Bai Premkuvar v. Bhika Kallianji*(1) is only an authority for the position, that leprosy is a good defence to a claim for restitution of conjugal rights. The duty of the wife is to live with her husband, especially when he needs her care most. Right to claim maintenance rests upon her duty to live with the husband. When her duty ceases her right also ceases. The passage in Manu, chapter 9, section 79, is not against me. *Binda v. Kaunsilia*(2). Moreover in this case the wife deserted her husband long before the attack of leprosy, and her claim is not good, and she now urges it as a pretext for not living with him. If husband's leprosy is a good cause for separate maintenance, a leprous wife also can claim it. It would be inequitable to award maintenance against a leper who has no property.

B. Sitarama Rao for respondent.—The lower Courts have found that leprosy was of a virulent type; that is a question of fact. Though there is no decided case, text-writers treat leprosy as a ground for claiming maintenance; Battacharya's Hindu Law, 2nd Edition, page 405; Strange's Hindu Law, Vol. I, page 47; Culluca's Gloss on Manu printed in Colebrooke's Digest, Vol. II, page 128; Gour's Hindu Code, page 266. According to defendant's own admission, leprosy began before his wife left him.

SPENCER, J.—This suit was brought by a wife to recover arrears of maintenance from a leprous husband. Defendant appeals. SPENCER, J.

(1) (1868) 5 Bom. H.C.R. (A.C.J.), 209.

(2) (1891) I.L.R., 13 All., 126.

SHINAPPAYA
v.
RAJAMMA.
SPENCER, J.

Two of the grounds raised in the arguments, namely (1) that the defendant's leprosy was not of a virulent form, and (2) that the plaintiff having originally deserted her husband without any justifying cause cannot make his disease a pretext for demanding maintenance whilst continuing to live apart from him, may be disposed of briefly by observing (1) that it has been found by the Subordinate Judge upon the defendant's admission that the disease has now assumed a virulent form, and that finding being on a question of fact is final; (2) that plaintiff having begun to live separately in 1908 and the defendant having, when examined in 1919, admitted that his leprosy commenced 10 years ago, the existence of the husband's disease and the wife's going away to live separately are sufficiently connected in point of time to justify the inference that the separation was occasioned by the disease, although there was no medical certificate as to the existence of leprosy earlier than December 1913.

On the substantial point of law, which is whether a wife is entitled to get maintenance from her husband, when she declines to live with him on account of his being a leper, our attention has not been called to any reported cases in which the point has been directly decided. In *Bai Premkwar v. Bhika Kallianji*(1) it was held that the fact that a Hindu husband was suffering from a loathsome disease, such as leprosy, was a good defence to his suit for the restitution of conjugal rights. It seems to follow that, if a leprous husband cannot enforce cohabitation upon an unwilling wife, he equally cannot make his disease a defence to her suit for maintenance so long as he has means to maintain her.

(1) (1868) 8 Bom. H.C.R., (A.C.J.), 209.

In Manu IX, 79 the passage occurs :

“ She who is averse from a mad husband or one afflicted with such maladies as punish crimes should not be stripped of her property.”

SHINAPPATA
v.
RAJAMMA.
—
SPENCER, J.

I believe, I am right in thinking that leprosy is ordinarily regarded in this country as a punishment for sins committed in this or some previous existence, and that this is the explanation of the allusion to punishment.

If then a wife is not to be penalized by depriving her of her Stridhanam for her refusal to live with a husband who is suffering from a loathsome disease, it is equally impossible to conceive that the ancient law-givers intended that she should be allowed to starve for an act which no code of humanity or morality would condemn.

Granting that desertion by the wife is a good defence to a wife's suit for maintenance, it by no means follows that such a defence can be pleaded irrespective of the wife's counter plea that her separation from her husband was for good and sufficient cause. The lower Courts were therefore right in giving the plaintiff a decree. The Second Appeal fails and is dismissed with costs.

VENKATASUBBA RAO, J.—Is a wife entitled to claim separate maintenance from her husband on the ground that the latter is afflicted with leprosy? We have not been referred to any reported case on this subject, and the point has to be decided with reference to general principles and the texts of Hindu Law bearing upon it.

SUBBA
RAO, J.

It has been laid down that a wife can live apart from her husband for a justifiable cause. From time to time the Courts have had to consider whether in certain circumstances the wife is entitled to demand separate maintenance; and though, according to the decisions, certain causes have been held to be justifiable causes, the Courts have not made an exhaustive enumeration of such grounds.

SHINAPPAYA
 v.
 RAJAMMA.
 ———
 VENKATA-
 SUBBA
 RAO, J.

A similar question presented itself for determination of the Courts in suits by the husband for restitution of conjugal rights, and it was held that it was open to the wife to resist the suit by relying upon the defence that the husband was afflicted with a loathsome disease such as leprosy or syphilis. *Rai Premkumar v. Bhika Kallianji*(1). It seems to me reasonable to hold that the grounds which would be available to a wife to defeat a suit for restitution would also entitle her to live apart from her husband and claim separate maintenance. But it has been argued on behalf of the appellant (husband) that, while the Courts may properly refuse assistance to a husband who seeks restitution, they should not enable a wife who chooses to live separately to get maintenance; in other words, if the husband who is suffering from leprosy or is afflicted with a similar malady seeks the aid of the court to compel his wife to live with him, the Courts must withhold that aid; similarly, if a wife forgetful of her duties to her husband deserts him when her services are most needed, the Courts must not enable her to get separate maintenance from the husband who has been wronged.

I am unable to accept this contention. The wife may no doubt acquire great spiritual benefit by a life of renunciation and sacrifice. But the Courts can only determine the legal relations between the parties, and in doing so cannot take note of exalted spiritual notions. Nor can the Courts of law prescribe rules to regulate conceptions of duty and it would be futile to attempt any enumeration of duties incumbent upon a wife. To give effect to the appellant's argument would amount to a refusal of maintenance to a starving wife on the ground of her desertion of her husband, who, it is admitted, is

(1) (1888) 5 Bom. H.C.R. (A.C.J.), 209.

disqualified to insist upon having the society of his wife. This result is opposed not only to Hindu sentiment and public opinion but contravenes the original authorities on the subject.

SHINAPPAYA

2.
RAJAMMA.VENKATA-
SUBBA
RAO, J.

Manu says—

“ But she who is averse from a mad husband or a deadly sinner or a eunuch or one without manly strength or one afflicted with such maladies as punish crimes must neither be deserted nor be stripped of her property.”

Cullukabhata explains the text thus :

“ But she who attends not a husband whose mind is alienated by the effect of air or other constitutional element, or a deadly sinner as described in the 11th Chapter or unmanned or destitute of manly strength (from an obstruction of the seminal juices or the like) or degraded because he is afflicted with leprosy or similar disease must not be deserted nor deprived of her property.”

Reference in the text of Manu to deprivation of wife's property will become intelligible if the two following rules are read in this connexion :—

(1) “ For a whole year let a husband bear with his wife who treats him with aversion ; but after a year let him deprive her of her separate property and cease to cohabit with her.”

(2) “ She who neglects her lord though addicted to gaming, fond of spirituous liquors, or diseased must be deserted for 3 months and deprived of her ornaments and household furniture.”

An attempt to reconcile the text of Manu quoted above “ But she who is averse . . . property ” with the following text “ A husband who is not an out-caste should not be forsaken by a woman desirous of happiness in another world ” has led to the words “ aversion from a husband ” being interpreted as “ want of due attention ” not “ absolute desertion.” But the latter text only enjoins a moral duty and does not create a legal obligation. I do not think it is proper to maintain the distinction between diligent attention and absolute

SHINAPPAYA
v.
RAJAMMA.

desertion (see the above texts collected in Colebrooke's Digest, Vol. 2, pages 128 and 129).

VENKATA-
SUBBA
RAO, J.

Battacharya while enumerating the circumstances which entitle a wife to demand separate maintenance mentions the aforesaid text of Manu and refers to the causes specified therein as justifiable causes. See Battacharya's Hindu Law, 2nd Edition, page 405.

Strange's Hindu Law at page 47, Vol. I, contains the following passage :

“ Other causes as well as infidelity operating to disappoint the primary object of marriage, lead to separation : such as confirmed barrenness in the woman and corporal imbecility in the man, with loathsome or incurable disease in either.”

The text of Devala lays down—

“ The husband may be forsaken by his wife if he be an abandoned sinner or an heretical mendicant or impotent or decrepit or afflicted with phthisis or if he have been long absent in a foreign country.” Colebrooke's Digest, Vol. II, page 164.

Mr. Justice MAHMOOD in the judgment in *Binda v. Kaunsilia*(1), makes certain observations in regard to the inclusion of insanity in the list of justifiable grounds and comes to the conclusion that insanity is not a legal ground. The learned Judge also expresses approval of the view that the word “ aversion ” is to be interpreted to mean want of due attention. With great respect, I cannot agree with either of the views referred to above adopted by Mr. Justice MAHMOOD. Reliance has been placed by the appellant upon the following passage from Mayne—

“ If she quits him of her own accord either without cause or on account of such ordinary quarrels as are incidental in married life in general she can set up no claim to a separate maintenance. Nothing will justify her in leaving her home except such violence as renders it unsafe for her to continue there or such

continued ill-usage as would be termed cruelty by any English Matrimonial Court."

It cannot be said that the enumeration of causes in this passage is exhaustive. It takes no account of the grounds mentioned both by Manu and Devala.

I am therefore of the opinion that, the existence of leprosy in the husband entitles the wife to live separately from the husband and demand maintenance.

The finding on the nature of the disease is contained in the following passage in the judgment of the District Munsif :

"Even the defendant admits that his leprosy commenced 10 years ago and that it appeared on his right leg and afterwards his left leg, that at the time of previous suit both the legs were somewhat affected and even the fingers of his hand were affected, that some of his fingers are contracted and swollen, that there were sores in his leg sometime back, and that they were in a putrified condition and pus was coming out."

There is therefore no force in the contention that the defendant's leprosy was not of a virulent form.

It has been argued that, if the wife abandons the husband without a justifiable cause and the husband subsequently becomes a victim to a disease like leprosy, the wife cannot take advantage of such a cause and claim maintenance. This argument raises a very interesting question. But it is unnecessary to decide it here on account of the finding that the wife abandoned the husband in about 1908, a point of time when the defendant according to his own admission was suffering from leprosy.

It is admitted also that the husband is possessed of property and that the maintenance awarded is not excessive. The District Munsif says "what is claimed is just the bare maintenance which is absolutely necessary for a woman to keep body and soul together." Whether a decree can be passed against a leprous husband

SEINAPPATA
D.
RAJAMMA,
—
VENKATA-
SUBBA
RAO, J.

SHINAPPAYA
v.
RAJAMMA.
—
VENKATA-
SUBBA
RAO, J.

who owns no property is not a question that arises for determination. It may be a legitimate argument that a husband who cannot earn an income for his own maintenance on account of his being a leper should not be compelled to find means for the support of a wife who deserts him. But in view of the finding mentioned above this question does not arise and no decision need be given upon it.

In the result I agree with my learned brother in holding that the Second Appeal fails and must be dismissed with costs.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1922,
September 6.

MADURA MUTHU VANNIAN AND SIX OTHERS—ACCUSED.*

*Criminal Procedure Code (Act V of 1898), ss. 256, 342 and 537—
Warrant cases—Examination of accused before charge framed—Omission to examine by Magistrate after further cross-examination of Prosecution witnesses—Irregularity—
Illegality.*

In warrant cases accused must be examined after the further cross-examination of prosecution witnesses even though he has been examined before the charge was framed. Failure to so examine an accused is not a mere irregularity such as is contemplated in section 537 but an illegality which vitiates the trial.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by A. J. KING, Additional District Magistrate, Tanjore.

* Criminal Revision Case No. 187 of 1922.