PRIVY COUNCIL.

RAMABAI (DEFENDANT No. 1), APPELLANT *v.* HARNABAI (PLAINTIFF) AND ANOTHER (DEFENDANT No. 2), RESPONDENTS.

J. C.*
1924.
February 1.

[On Appeal from the High Court at Bombay.]

Hindu law—Leprosy—Right to enjoy joint family property—Power to adopt —Test of disqualification.

Upon an issue whether a Hindu governed by the Mitakshara was excluded by reason of leprosy from the position of joint owner of property of his joint family, and from making an adoption, it was concurrently found by the Courts in India that although the Hindu in question was afflicted by a certain type of leprosy, it was a type which was not very apparent except to minute inspection, and one which did not exclude him from performing his social and religious duties in company with others.

Held, affirming the lower Courts, that the leprosy was not a disqualification.

Kayarohana Pathan v. *Subbaraya Thevan*[1] approved, and *Mohunt Bhagaban Ramanuj Das* v. *Mohunt Roghunundun Ramanuj Das*[2] agreed with in substance.

APPEAL (No. 80 of 1922) from a decree of the High Court (December 5, 1918) affirming a decree of the Additional First Class Subordinate Judge of Poona (November 1, 1916).

The suit was brought in 1915 by the first respondent against the appellant and the second respondent for a declaration that she was entitled to inherit the movable and immovable property of her father, Narayan Mawal, who died in December 1914. Narayan Mawal and his son Vishnu Narayan had formed a joint Hindu family governed by the Mitakshara. Vishnu Narayan died childless in December 1913, being survived by a widow Ramabai, the present appellant. In October 1914, Narayan Mawal purported to adopt Vishnu Narayan Puranik, respondent No. 2.

The plaintiff-respondent, Harnabai, by her plaint contended that the adoption of respondent No. 2 was invalid, as the ceremony of *datta homa* had not been

* *Present.*—Lord Shaw, Lord Blanesburgh and Sir John Edge.

(1) (1913) 38 Mad. 250. (2) (1895) L. R. 22 I. A. 94 ; 22 Cal. 843.

1924.

RAMABAI v. HARNABAI.

performed, and that she was entitled as heir to her father, the appellant being only entitled to maintenance.

The appellant by her written statement alleged that before the death of her husband, Vishnu Narayan, his father Narayan Mawal was suffering from leprosy and was thereby disqualified from participating in the joint family property, and she contended that her deceased husband, Vishnu, consequently became entitled as sole co-parcener and that she succeeded to the properties upon her husband's death; she also contended that Narayan Mawal was incompetent by reason of leprosy to adopt respondent No. 2.

Respondent No. 2 by his written statement denied that Narayan Mawal was suffering from leprosy as alleged, and pleaded that his own adoption was valid and that he was entitled by survivorship.

The trial Judge held that the adoption was in fact made and was valid, since the *datta homa* was not necessary, as the adoptive father and the adopted son were in the same *gotra*. Upon the issue as to Narayan's leprosy, after considering the authorities and examining the medical and other evidence called, he said: "All this and the more important fact that he used to perform worship in the Alandi temple along with others, although other lepers would worship from outside the temple, is more than enough proof that the deceased was not excluded from social intercourse; that he freely mixed in society and managed his affairs. Thus he could not be considered a social cypher unfit to hold and manage property". Upon this finding he held that Narayan Mawal was not disqualified as alleged. Accordingly he dismissed the suit.

The present appellant appealed to the High Court which dismissed the appeal. The learned Judges (Scott C. J. and Shah J.) said:

"The disqualification relied upon is the disqualification of leprosy which is said to result from Chap. II, section X of the Mitakshara, placita 1 and 2, 5

and 6. Leprosy has been held to be an incurable disease such as disqualifies from inheritance and participation within the meaning of section X of the 2nd Chapter of the Mitakshara. But leprosy is of more than one kind. There is tuberculous leprosy and there is anæsthetic leprosy and there is mixed leprosy of the two first mentioned classes. Now it has been held for a number of years upon the authority of Strange's Hindu Law, which was published in 1825, that leprosy to disqualify must be of the sanious or ulcerous kind. (See *Ananta* v. *Ramabai*[1] and *Mohunt Bhagaban Ramanuj Das* v. *Mohunt Roghunundun Ramanuj Das*[2].) The sanious or ulcerous kind of leprosy is that which is known to medical men as tuberculous leprosy. It is much more quickly fatal than the anæsthetic kind, generally causing death within 7 or 8 years, and it is marked by great disfigurement of the face, with nodules which become ulcerous, and render the person afflicted loathsome in the sight of his fellow-men. Anæsthetic leprosy has different symptoms and is more chronic. It may continue for 20 years. It is marked by contraction of the fingers and toes which may eventually drop off, and also by perforated ulcer on the heel. But it does not necessarily involve any disfigurement of the face or loss of hair. Mixed leprosy is, as its name indicates, leprosy wherein the symptoms of the tuberculous and the anæsthetic types are found in combination. The question is whether Narayan who certainly was a leper suffered from the tuberculous or the anæsthetic type. As to the indications of the different classes of leprosy there is no dispute. They are established upon the evidence of Dr. Liston and Dr. Choksey in the present case, which is borne out by the article on leprosy in the Encyclopædia Britannica."

After examining the medical and other evidence they said :

"The body of evidence called on behalf of the second defendant leaves no doubt in the mind of the Court that the deceased could not have been suffering from a loathsome disease, or there would not be such strong evidence of his free intercourse with his fellow-men up to a short time before his death. We, therefore, accept the conclusion arrived at by the learned Subordinate Judge in the very-full and careful judgment which he has delivered in this case."

1924, February 1:—*Narasimham* for the appellant:—The Mitakshara, Chapter II, section 10, placita 1, states that "persons afflicted by an incurable disease" are excluded from inheritance, and although leprosy is not mentioned in the text, leprosy in all its forms falls within the prohibition. There is no authority in Hindu texts to

(1) (1877) 1 Bom. 554. (2) (1895) L. R. 22 I. A. 94 at p. 95.

1924.

RAMABAI v. HARNABAI.

support the distinction drawn in the decisions in India between the virulent and the milder or anæsthetic type. The only decision of the Privy Council relative to the question is *Mohunt Bhagaban Ramanuj Das* v. *Mohunt Roghunundun Ramanuj Das*[1], where it arose incidentally and relatively to a succession as Mahant; the texts were not then considered. In the present case the High Court treated the question whether there was an unfitness for social intercourse as being the test; as was done in *Kayarohana Pathan* v. *Subbaraya Thevan*[2]. That test may lead to results differing from an application of the "curability" test; it is not supported by the Hindu texts nor by the earlier decisions in India.

De Gruyther K. C. and *Parikh*, for the respondent No. 2—The concurrent findings are conclusive against the appellant. That it is only the virulent form of leprosy which disentitles a Hindu from inheriting rests upon judicial decisions in India going back to 1857, and that view had the approval of the Privy Council in the case already referred to. The question of unfitness from social intercourse is a sound method of arriving at whether the leprosy in question is or is not of that type. Reference was made to *Janardhan Pandurang* v. *Gopal Pandurang*[3] and *Kayarohana Pathan* v. *Subbaraya Thevan*[2]. [They were not heard further.]

The judgment of their Lordships was delivered by

LORD SHAW:—The case for the appellant has been stated with admirable clearness and brevity by his counsel, but their Lordships do not think it necessary to call for any full argument for the respondents.

This is an appeal from a decree of the 5th December, 1918, of the High Court of Judicature at Bombay,

[1](1895) L.R. 22 I.A. 94; 22 Cal. 843. [2](1913) 38 Mad. 250.

[3] (1868) 5 Bom. H. C. (A. C. J.) 145.

which affirmed a decree, dated the 1st November, 1916, of the Court of the Additional First Class Subordinate Judge at Poona.

The only question submitted to the Board, and now subsisting, is as to the condition of body, and possibly of mind, of one Narayan Mawal. The appellant maintains that Narayan Mawal was so afflicted with leprosy as to deprive him of the position of being joint owner of certain family property, and secondly to deprive him of the ability to make a valid adoption of a son. His natural son had died and the adoption was made a few weeks before his death. Had Narayan not been a leper, this natural and proper act could not have been challenged.

In the opinion of the Board no question of fact arises on this appeal. It appears to be definitely concluded by both of the Courts below, which both concur in their findings. The High Court in terms expresses approval of the decision of the Court of first instance: and the decision of the Court of first instance is to the effect that Narayan Mawal was not so crippled or disabled by bodily infirmity or deformity as to cease to be a useful member of society capable of holding and enjoying property. Their findings show that although he was afflicted with a certain type of leprosy it was a type not very apparent except to minute inspection, and certainly a type which did not unfit him for performing both social and religious duties in company with others.

In these circumstances the law of the case is attacked by the appellant's counsel, but the law of the case may be stated to have been well settled in India for very many years. In the case of *Kayarohana Pathan* v. *Subbaraya Thevan*[1], a joint judgment of Benson and

[1] (1913) 38 Mad. 250.

1924.

RAMABAI v. HARNABAI.

Sundara Ayyar JJ., concludes with the following proposition: "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".

In the case of *Mohunt Bhagaban Ramanuj Das* v. *Mohunt Roghunundun Ramanuj Das*[1], Sir Richard Couch delivered a judgment of this Board which substantially agreed with that test. Sir Richard Couch was already deeply committed on the subject, for, so far back as the year 1868, in the case of *Janardhan Pandurang* v. *Gopal Pandurang*[2], he had expressed himself in nearly similar terms.

The result is that their Lordships will humbly advise His Majesty that this appeal be disallowed with costs.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondents: Mr. *E. Dalgado.*

A. M. T.

[1] (1895) L. R. 22 I. A. 94. [2] (1868) 5 Bom. H. C. (A. C. J.) 145.

ORIGINAL CIVIL.

Before Mr. Justice Fawcett.

1923.

September 13.

SHAMSUDIN TAJBHAI (PLAINTIFF) *v.* DAHYABHAI MAGANLAL (RESPONDENT)*.

Contract—Specific performance—Sale of immoveable property—Delay in answering requisitions—Time made of the essence—Failure to complete—Property put up to auction—Suit by vendor for specific performance or damages—Measure of damage—Indian Contract Act (IX of 1872), section 73—Conveyancing practice in Bombay—Recital in deeds over 20 years old—Costs of obtaining copies of orders and decrees to be borne by purchaser.

On the 23rd January 1920 the plaintiff agreed to sell certain immoveable property to the defendant for Rs. 46,000. Rs. 2,000 was paid as earnest

* O. C. J. Suit No. 2780 of 1921.