1895.

MÁLÁPA v. DEVI.

suits have to be brought we find that express power to sue is given as in section 7 of this Regulation and in section 9 of Act XIX of 1841 and in section 18 of Act VII of 1874. By appointment the administrator does not become in any way the representative of the deceased person. He is merely the custodian of the property in existence and in hand for a time until the rightful owner appears or the property is sold under clause 4 of the section. The decision in *Mir Ibrahim* v. *Ziaulnissa*[1] is only a ruling that as long as an administrator appointed under section 9 is in existence, alleged heirs cannot sue. The opinion expressed that the authority given to the administrator under section 9 must be understood to be the same as under section 7 is an *obiter dictum*, and we do not consider it applicable to the case of an administrator appointed under section 10.

Under the provisions of section 366 of the Code of Civil Procedure we must, therefore, pass an order that the appeal abate and award the respondents the costs incurred in defending this appeal to be recovered from the estate of the deceased appellant.

Order that the appeal abate.

[1] I. L. R., 12 Bom., 150.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

1895.
October 2.

CHENAVA (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* BASANGAVDA (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Adoption—Lingáyats—Adoption in dwyámushyáyána form—Divided brothers.

Amongst Lingáyats the *dwyámushyáyána* form of adoption is not obsolete. The adoption can take place in cases in which brothers are divided as well as where they are joint.

SECOND appeal from the decision of J. L. Johnston, District Judge of Dhárwár, confirming the decree of Ráo Sáheb M. N. Nádgir, Second Class Subordinate Judge of Hubli.

The plaintiff and defendants were Lingáyats. The plaintiff sued to recover possession of certain lands and houses, alleging that

* Second Appeal, No. 327 of 1894.

1895.

CHENAVA v. BASANGAVDA.

his uncle Gulangavda, the divided brother of his father, had been the owner of the property. Gulangavda had adopted the plaintiff as his son and passed a *váraspatra* in his favour, giving up to him all his property, including the right to serve as pátel. The plaintiff stated that he had thus become owner of the property which was during his minority managed on his behalf by defendant No. 1, Gulangavda's widow, and that on attaining majority he had requested her to make it over to him, but she in collusion with the other defendants refused to do so.

Defendant No. 1 denied the plaintiff's adoption by Gulangavda and contended that she had no knowledge of the execution of the *váraspatra* by her husband, that the *váraspatra* could not be acted on for want of consideration, and that the plaintiff had not acquired any title under it.

Defendant No. 2, Chenava, the daughter of defendant No. 1, put in no written statement.

At the trial plaintiff's pleader stated that the plaintiff had been adopted as *dwyámushyáyána* son, and that he based his claim on the *váraspatra* also.

The Subordinate Judge found that the plaintiff's adoption by deceased Gulangavda as *dwyámushyáyána* son was proved, that the *váraspatra* sued on was proved, and that the plaintiff had acquired ownership of the property in suit. He, therefore, allowed the claim.

On appeal by defendant No. 2 the Judge confirmed the decree.

Defendant No. 2 preferred a second appeal.

Shivrám V. Bhandárkar for the appellant (defendant No. 2) :—Three points arise in the present case : First, whether the adoption was made in the *dwyámushyáyána* form as such.

[FARRAN, C. J. :—Both the lower Courts have found as a fact that the adoption was made in that form. The question, therefore, cannot be re-opened in second appeal.]

Secondly, whether the adoption is valid, the plaintiff being the only son of a divided brother ; and, thirdly, whether such form of adoption is valid in this age.

There is also a *wáraspatra* executed in plaintiff's favour; but if the plaintiff's status as the adopted son fails, then he would not get anything under the *wáraspatra*, because it was executed in his favour in his capacity as adopted son.

[FARRAN, C. J., referred to *Basáva* v. *Lingangauda*(1).]

In that case a custom as to this kind of adoption was set up, while in the present case the plaintiff does not rely on custom. *Dwyámushyáyána* adoption can take place only when the brothers are united, and there must be an express stipulation at the time of the adoption that the adopted boy is to be the son of the two brothers—West and Bühler, page 1134. But when the brothers are divided, then, we submit, that even with such express stipulation no *dwyámushyáyána* adoption can take place. If two brothers are undivided, and one of them has got a son, then that son has the chance of succeeding to the estate of his sonless uncle; but if the brothers be divided, the chance is very remote. The son of the other brother may subsequently come in as a reversioner, but not directly as an heir. We submit that this is the principle on which *dwyámushyáyána* adoption is allowed.

Next we contend that this kind of adoption has become obsolete, and is not now recognized—*Srimati Uma Devi* v. *Gokoolánund*(2); *Nilmadhub* v. *Bishumber*(3); Mandlik's Vyavahára Mayukha, p. 506.

Náráyan G. Chandávakar, for respondent (plaintiff):—*Nilmadhub* v. *Bishumber*(3) supports our case. See also West and Bühler, p. 898.

[FARRAN, C. J., referred to *Vasudevan* v. *The Secretary of State*(4)].

The adoption in the *dwyámushyáyána* form would be good even in the case of divided brothers, because they can re-unite.

FARRAN, C. J.:—The plaintiff as the adopted son of Gulangavda, deceased, brought this suit to recover certain lands and houses at Hubli from Marilingava, the widow, and Chenava, the daughter of Gulangavda. The parties are Lingáyats.

(1) I. L. R., 19 Bom., 428.
(2) L. R., 5 I. App., 40.
(3) 13 M. I. App., 85 at p. 101.
(4) I. L. R., 11 Mad., 167.

1895.

CHENAVA v. BASANGAVDA.

Gulangavda, who was married and had a daughter, was divided from his brother Kenchangavda. The plaintiff was the only son of the latter. His allegation was that he had been adopted as *dwyámushyáyána* son by his deceased uncle Gulangavda, and that he was, therefore, entitled to the property left by Gulangavda. Both the lower Courts have found the adoption of the plaintiff in this form to be proved. Such a finding of fact is binding in second appeal, and there is, besides, no reason for questioning its correctness.

Before us it is contended that the plaintiff's adoption made in the *dwyámushyáyána* form is ineffectual on the grounds (1) that such adoptions are now obsolete and consequently invalid; (2) that they cannot take place between divided brothers, *i. e.*, that a sonless Hindu cannot adopt the only son of his divided brother by the *dwyámushyáyána* form.

It was also urged that the adoption was not at the time of the ceremony pronounced to be in this form; but the evidence does not support the latter contention.

We feel unable to hold as a proposition of law that the *dwyámushyáyána* form of adoption of a son is invalid on the ground that it is obsolete. We are not, of course, referring to the *dwyámushyáyána* son described in the Mitákshara, Chapter I, section X, who is not recognised in Kaliyuga age (West and Bühler, 3rd edition, page 879,) but to the son adopted to fill a position analogous to that which such a son occupied at the time when he was recognised as one of the twelve classes of sons. The argument of the appellant's pleader is based chiefly on a passage in Mr. Mandlik's Translation of the Vyavahára Mayukha in which, commenting on the passages in that work (Chapter IV, sec. 5, pl. 21-25) relating to the *dwyámushyáyána* form of adoption he says (p. 506): "The result is that the conclusion arrived at by the Madras Sadar Court appears to me to be correct, namely, that the *dwyámushyáyána* form of adoption is not recognised in this age. At any rate, whatever may be the theory, it is so in practice."

Adoptions in this form are doubtless rare, probably because, as pointed out by Ránade, J., in *Basava* v. *Lingangauda*[1], this form

(1) I. L. R., 19 Bom., at p. 455.

of adoption has not as great religious efficacy as the *dattaka* form. That learned Judge, however, recognises the form as still existing "though generally, if not altogether, obsolete in this Presidency." Jardine, J., in the same case, after referring to the principal text-books and decisions upon the subject, says (page 467): "On consideration of these authorities I am not inclined to hold that the *dwyámushyáyána* son is obsolete in this age in the southern parts of the Bombay Presidency." Mr. Justice Ránade refers to one instance (page 453) as clearly proved by the evidence which he was considering of an adoption in this form; and that evidence was consistent with there having been others (page 454). There is a considerable body of authority in favour of its present existence. Steel's Law and Custom points to it as not unknown—47, 384, 45, 183. In West and Bühler (page 898) the learned authors say that "from personal inquiries it appears that he (the *dwyámushyáyána* son) is not at all unusual in the southern districts of Bombay." On the Malabár Coast it was proved in *Vasudevan* v. *The Secretary of State*[1] to be the ordinary form recognised there. Mr. Mayne (section 160) says that the weight of authority in opposition to the statement (that it is obsolete) seems to be overwhelming. The authorities which he refers to, bear out his view. The slokas cited by him from the Dattaka Mimansa and the Dattaka Chandrika are recognised by the Privy Council in *Srimati Uma* v. *Gokoolánund*[2] as declaring the law upon this subject (page 50). That, however, was a Bengal case, but these treatises are current in Bombay. As, therefore, this form of adoption is permitted by the shástras and is recognised by current Hindu treatises, there is, we think, no reason why it should not be recognised by the Courts of law in this Presidency. There is, in our opinion, no legal impediment to its taking place where in places in which it is not unknown parties resort to it.

As to the second ground urged by the appellant, we have not been able to find any authority in support of it. This kind of adoption appears to be allowed as well in the case of a divided as of an undivided brother. The reason why it is more common in the former case, we have already referred to.

(1) I. L. R., 11 Mad., 157. (2) L. R., 5 I. A., 40.

1895.

CHENAVA v. BASANGAVDA.

To assure the effect of the adoption in this case the deceased executed a *wáraspatra* in the plaintiff's favour. We do not regard that as indicating on his part a belief in the inadequacy of the former rite.

We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

[Before Mr. Justice Jardine and Mr. Justice Ránade.

1895. *October* 8.

DESA'I RANCHHODDA'S VITHALDA'S AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* RA'WAL NATHUBHA'I KESA'BHA'I AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Widow—Daughter—Custom, proof of—Exclusion of women from succession—Gohel Girássias—High Court—Second appeal—Interference in second appeal with findings of fact based on wrong views of law—Limitation.

Hathibhái, a Gohel Girássia, died in or about 1866, leaving a widow Motiba and a daughter Báiba, and possessed of certain lands. Motiba died in 1887. In 1890, the plaintiffs, who were divided collaterals of Hathibhái, sued to recover the lands, alleging that they succeeded thereto on the death of Hathibhái, widows and daughters being excluded from inheritance according to the custom among the Gohel Girássias. The lower Courts found that the lands were never in plaintiffs' possession; that Motiba held them till December, 1882, since which time defendants Nos. 1—3 had them in their enjoyment as purchasers from her; that the custom proved excluded daughters, but not widows, from inheritance; and that the claim was within time, having been made within twelve years of the death of Motiba. On second appeal to the High Court,

Held (1) that the alleged custom excluding daughters was not proved;

(2) that the plaintiffs should not have been allowed to shift the basis of their claim from an alleged custom which excluded both widows and daughters to one which only excluded daughters;

(3) that since limitation must be applied to the plaintiffs' claim as they made it, and tried to prove it, Motiba's possession was adverse to them and, being for more than twelve years, barred the suit.

If the decree appealed against is based on wrong views of the law of evidence, or on a misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved, the High Court will interfere in second appeal.

* Second Appeal, No. 426 of 1894.