

1895.

PANDHA'RI-  
NA'TH  
v.  
MAHABUB-  
KHAN.

*man v. Moru*<sup>(1)</sup> relied on by the District Judge. The son in that case, who was a Hindu, was in actual and apparently in juridical possession of the land of which he took the crop. The judgment-debtor, the father, was not in possession. It was, therefore, held, that the symbolical possession taken by the plaintiff did not affect the son, who was not a party to the proceedings. The facts, though they have an apparent resemblance to, are really different from those in the present case.

As the suit would not have been barred against A'jamkhan had he survived, it is not barred against his sons and heirs whose rights are derived from him. We reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge with costs on the defendant No. 1 in this and the lower Appellate Court.

*Decree reversed.*

(1) I. L. R., 16 Bom., 722.

## APPELLATE CIVIL.

*Before Chief Justice Barran and Mr. Justice Parsons.*

1895.  
October 2.

MA'LA'PA SIDA'PA DESA'I (ORIGINAL DEFENDANT No. 1), APPELLANT,  
v. DEVI NA'IK (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Secs. 365 and 366—Regulation VIII of 1827, Secs. 7, 9 and 10—Act XLIX of 1841, Sec. 9—Act VII of 1874, Sec. 18—Death of appellant—Administrator of the property of the deceased placed on the record—Abatement of appeal.*

An administrator appointed under section 10 of Regulation VIII of 1827 does not by such appointment become the legal representative of the deceased, or entitled to continue an appeal filed by him.

APPEAL from the decision of Ráo Bahádur G. V. Bhánap, First Class Subordinate Judge of Belgaum.

In this case the plaintiff obtained a decree in the lower Court. The first defendant (appellant) who was a minor and was represented by his guardian *ad litem* A. P. Vardráj, the Názir of the District Court of Belgaum, appealed against the decree. On the 7th March, 1894, while the appeal was pending the appellant (defendant No. 1) died.

\* Appeal, No. 64 of 1893.

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On the 4th September, 1894, A. P. Vardráj, the Názir of the District Court, applied to be placed on the record as the legal representative of the deceased, as he had been appointed administrator of his property under section 10 of Regulation VIII of 1827. The Court passed an *ex-parte* order on the 14th September, 1894, granting the application.

The appeal now came on for hearing in the High Court.

A preliminary objection was taken for the respondent (plaintiff) that the Názir had been improperly placed on the record as the legal representative of the deceased appellant; that there was no proper representative on the record, and that the appeal must, therefore, abate under section 366 of the Civil Procedure Code (Act XIV of 1882).

*P. M. Mehta* with *Vásudev G. Bhandárkar* for the respondent (plaintiff):—The question is whether an administrator appointed under section 10 of Regulation VIII of 1827 is the legal representative of the deceased appellant and entitled as such to be placed on the record and continue the appeal under sections 365 and 582 of the Civil Procedure Code. Section 10 of the Regulation has made provision for the appointment of a person to take possession of the property of the deceased until the proper heir comes forward. But that person cannot sue or defend a suit for the deceased. The explanation to section 366 of the Civil Procedure Code shows that the mere appointment of an administrator cannot make him the legal representative of the deceased, but when he gets possession of the property of the deceased, he can be treated as his legal representative liable in respect of such property.

[PARSONS, J., referred to *Shripal Rámchandra v. Visthoji valad Malhárji*<sup>(1)</sup>.]

*Inverarity*, with *Máneeksháh J. Talejarkhán*, for the appellant (defendant):—The administrator is responsible for the property of the deceased until the heirs appear. It is his duty to recover property in the hands of other persons. He could have filed a suit, and if so, he can conduct an appeal. The order allowing the administrator to be made a party is equivalent to his being

(1) 4 Bom. H. C. Rep., A. C. J., 178.

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appointed to conduct a suit as provided by section 367 of the Civil Procedure Code. *Mir Ibráhim v. Zianbnissa*<sup>(1)</sup> shows that the administrator represents the estate and he is the proper person to sue. The ruling indicates that an administrator is supposed to be given the same powers which he could get under section 7 of the Regulation, which provides that a person holding a certificate of heirship can sue and obtain judgment. The analogous cases of curators and receivers should be followed.

*P. M. Mehta*, in reply:—Section 7 of the Regulation provides for a certificate of heirship and empowers the holder of the certificate to sue. But section 10 relates to the appointment of an administrator, and does not authorize him to sue. The analogy of receivers and curators does not hold, because they are expressly authorized to bring and defend suits. The appeal must, therefore, abate under section 366 of the Civil Procedure Code.

PARSONS, J.:—The appellant died on the 7th March, 1894. On the 4th September, 1894, A. P. Vardráj, the Nazir of the District Court of Belgaum, asked to be placed on the record as the legal representative of the deceased, as he had been appointed administrator of his property under section 10 of Regulation VIII of 1827. An *ex-parte* order was made on the 14th September, 1894, granting the application.

It is now objected that as under section 365 of the Civil Procedure Code (Act XIV of 1882) no application has been made by any person who was the real legal representative of the deceased to have his name entered on the record in place of the deceased appellant, the appeal must abate under section 366. It seems to us that the objection must prevail. Section 10 of Regulation VIII of 1827 appears to contemplate the appointment of a person to take charge of property of which the Judge is actually in possession by means of his officers, so that it can at once be delivered over to the administrator and afterwards to successful claimants. It does not contemplate the necessity of any suit being brought either to obtain or to maintain possession, and it gives no power to sue to the administrator. The grant of such a power seems necessary. Accordingly where

(1) I. L. R., 12 Bom., 150.

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*<sup>(1)</sup> 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 Harlan and Mr. Justice Parsons.*

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

1895.  
October 2.

*Hindu law—Adoption—Lingáyats—Adoption in dvyámushyáyána form—  
Divided brothers.*

Amongst Lingáyats the *dvyámushyáyána* 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.