the schedule and partially satisfied by dividends declared in insolvency in order that each of them may be in a position to harass the insolvent by proceedings for arrest. At this stage we are not concerned with the question whether or not each of the Judges of this Bench would have made the same order as Mr. Justice Macleod in the case of this particular creditor, but we are concerned with the question whether his exercise of his discretion ought to be interfered with, and we are of opinion that there is no good reason for interference. If we were to interfere upon such materials as are before us such interference would or might logically lead to consequences which would involve an abuse of judicial proceedings.

We, therefore, dismiss the appeal with costs.

Solicitors for appellant: Messrs. *Little & Co.*

Solicitors for respondents: Messrs. *Payne & Co.*

Appeal dismissed.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

LAXMIPATIRAO SHRINIWAS DESHPANDE (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* VENKATESH TRIMAL DESHPANDE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 2 TO 13), RESPONDENTS.*

1916. *July* 21.

Hindu Law—Adoption—Dvyamushyayana *adoption—Presumption.*

In every case of a *nitya dvyamushyayana* form of adoption, there must be an agreement to that effect: such an agreement must be proved by the person setting up the *dvyamushyayana* adoption, like any other question of fact, as much in the case of the adoption of an only son of a brother as in any other case of such an adoption.

* Second Appeal No. 339 of 1911.

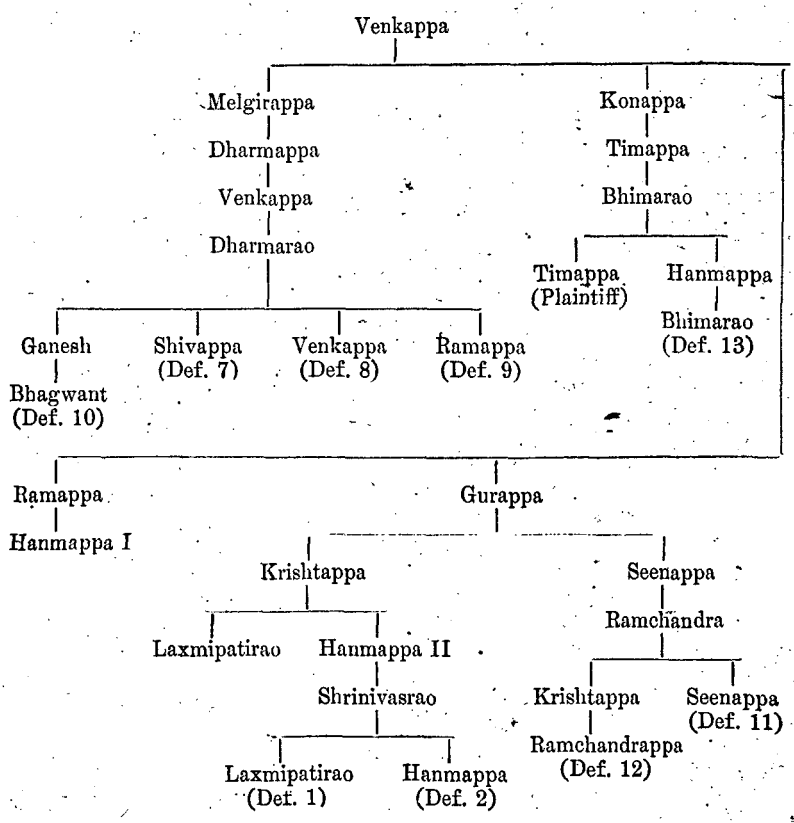
1916.

LAXMIPATI-RAO v. VENKATESH.

SECOND appeal from the decision of T. D. Fry, District Judge of Dharwar amending the decree passed by T. V. Kalsulkar, Subordinate Judge at Hubli.

Suit to recover possession of property belonging to Hanmappa II.

The relationship between the parties is shown by the following genealogical tree:—



Hanmappa II had two wives. By his first wife he had one son Shrinivasrao, and two daughters (defendants Nos. 4 and 5). He had, by his second wife Gangabai, one daughter, defendant No. 3. Hanmappa II was adopted by Hanmappa I. Later Shrinivasrao was taken in adoption by Laxmipatirao, the natural brother of Hanmappa II. Hanmappa II died in 1852: his property

was held by his widow Gangabai, who continued in possession of it till her death which took place in 1898.

In 1902, the plaintiff, who was a great-grandson of Konappa, sued to recover a one-fifth share in the property of Hanmappa II, which being *vatan* property enured to the male descendants of the family to the exclusion of the daughters of Hanmappa II. The other male representatives of the family were added as defendants Nos. 7 to 13.

Defendant No. 1, a son of Shrinivasrao, contended *inter alia*, that the adoption of Shrinivasrao by Laxmipatirao was in the *dvyamushyayana* form which left him competent to inherit both to Laxmipatirao and Hanmappa II; and, secondly, that the plaintiff's claim was barred by limitation.

The lower Courts held that the adoption of Shrinivasrao was in the ordinary form and not in the *dvyamushyayana* form; and that therefore he could not claim to inherit Hanmappa II's property. It was further held that the plaintiff's claim was not barred by limitation. The claim was accordingly decreed.

Defendant No. 1 appealed to the High Court.

Jayakar with *Nilkanth Atmaram*, for the appellants:—The learned Judge below has misconceived the true nature of a *dvyamushyayana* adoption. He thinks it is a matter of coupling both the fathers' names, and that such a relationship can proceed only from an agreement. No doubt, in many cases an express stipulation, that the son shall be regarded as the son of both the fathers, does exist and in such a case, by reason of the express stipulation that species of *dvyamushyayana* is recognized in Hindu law as the *nitya* or perpetual variety. But apart from it there is another variety where no express stipulation is necessary, for the law implies such a stipulation from the

1916.

LAXMIPATI-RAO v. VENKATESH.

circumstances of the case. The most notable instance of such an implication arises in the case where the only son of one brother is given in adoption to another brother. In such a case, rather than presume that by giving away his only son the genetive father's line would be without a son to offer *shradhas* to the genetive father and his ascending line, the law regards such a son as available for purposes of oblations, and, therefore, for inheritance, in both the lines. This presumption arose in ancient law from reasons of public policy, very akin to those which incline the Courts in England to lean against intestacy, with this difference that in India the presumption rose to be a presumption in law because it touched the very roots of the law of inheritance. It had its basis in the doctrines laid down in the Mitakshara, Chap. I, section 10, pl. 1—3, and though in course of time that notion became repugnant to the public sentiment, its place appears to have been taken by a more convenient substitute indicated by Manu's texts (IX, 182) 'if one among brothers of the whole blood be possessed of male issue...they are all fathers of the same by means of that son': see *Wooma Daee* v. *Gokoolanund Dass.*[1] Such a son in course of time came to be in vogue, especially in the Kali age: see Dattaka Mimansa I, 66 and West and Buhler, 896, 897: see also *Sreemutty Joymony Dossee* v. *Sreemutty Sibosoondry Dossee*[2], Ryan C. J.'s view.

No doubt, the said son in Manu's texts is affiliated to all the brothers apart from his adoption; but in course of time such adoptions appear to have grown frequent. There is no doubt that gradually an *anitya* or non-perpetual variety came into existence, side by side with the *nitya* or perpetual one: see Tagore Law Lectures on Adoption, 1891 Edn., pp. 376, 377: see also Macnaghten's Principles and Precedents, p. 71. The

(1) (1878) 3 Cal. 587 at p. 598. (2) (1837) Fulton 75.

brother's son being the most eligible for adoption as mentioned in the order of preferential persons capable of being adopted, the law gave an additional encouragement to the adoption of the brother's only son, by surrounding it with the benefit of the presumption I have spoken of above.

There is no doubt that such adoptions have been recognized even in modern times, and exist in districts where the primitive notions of a joint family and *shradhas* survive. Mayne refers to such cases in paras. 145 and 173, and states with great clearness the law relating to such a presumption. Dr. Golap Chandra Sarkar, in his Hindu Law, at p. 155, explains the reasons underlying the theory, and in his Tagore Law Lectures on Adoption, 1891 Edn., at pp. 377, 301, mentions this variety as existing and distinct from the one arising from an express stipulation: see also Sutherland's Synopsis in Stokes' Hindu Law Books, p. 665 and see the same relied on in *Gocoolanund Dass* v. *Wooma Daee*[1] affirmed by the Privy Council in *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra*.[2] In *Nilmadhub Doss* v. *Bishumber Doss*[3] their Lordships of the Privy Council distinctly recognized such a presumption as strongly arising in the case of the only son of a brother; and West and Buhler, at p. 897, quote the ruling with approval. That approval is quite in keeping with the views held by old Pandits, one instance of which is to be found in *Raja Haimun Chull Sing* v. *Koomer Gunsheam Sing*.[4]

The trend of all these authorities is in keeping with the view of our own Court, which is favourable to the raising of such a presumption. The rulings of the Bombay High Court in this behalf show a distinct

(1) (1875) 15 Beng. L.R. 405 at p. 415.
(2) (1878) L. R. 5 I. A. 40.
(3) (1869) 13 Moo. I. A. 85 at p. 101.
(4) (1834) 2 Knapp 203 at pp. 206-8.

1916.

LAXMIPATI-RAO v. VENKATESH.

growth and development. In *Basava* v. *Lingangauda*,[1] where an undivided brother adopted the son of another brother, it was held that such a relationship arose apart from an express stipulation: see *Basava's case*.[2] In *Chenava* v. *Basangavda*[3] the same principle was followed in the case of divided brothers; in *Krishna* v. *Paramshri*[4] though the giving and taking was between widows and not their husbands the presumption was allowed to arise on the ground that the brother's son being regarded by the Shastras as being the most eligible person for adoption, the husband's soul would be pleased by such an adoption, and the widow, therefore, had an implied authority from her husband to make such an adoption.

It is no objection that here the brother had passed into another family by means of an adoption, for the blood-relationship is preserved in spite of the adoption: see Mayne's Hindu Law, section 172. Adoption only effects a change in the *gotra*, *riktha* and *pinda*, but the natural tie of blood which is based on the community of blood particles according to the Mitakshara, is not broken. The Mayukha, which perhaps gives the most extended interpretation to these technical words, e.g., the word *sambandha* (Mandlik's Translation, p. 59, ll. 4-7) clearly indicates that what is meant by this change is a spiritual conversion for the accomplishment of the "invisible virtue" (*adrishta*) whereby the son is enabled to perform the paternal duties of offering *shradhas* and the like. The Mayukha goes on to add that "in this manner alone sonship in the acceptor's family is capable of being produced", clearly indicating that in no *other* way is the change possible, e.g., by obliterating the blood-relationship, which being a fact in nature, cannot be undone by any

(1) (1894) 19 Bom. 428.
(2) (1894) 19 Bom. 428 at pp. 454, 455, 466, 467, 468, 471 and 483.
(3) (1895) 21 Bom. 105.
(4) (1901) 25 Bom. 537 at pp. 542, 543.

number of legal fictions. The instances of marriage and adoption cited by the Mayukha as showing a preservation of the blood-tie illustrate the above rule, but do not exhaust it. The Dattaka Mimansa and Dattaka Chandrika lay down no different rule, and in fact all the text-writers agree on the principle, which has for its ultimate basis the text of Manu (IX, 142).

This view derives further support from the terms of the text of Manu (IX, 182) "if among several brothers of the whole blood, one have a son born, Manu pronounces them all fathers of male issue by means of that son." As shown above, the rule relating to the presumption of *dvya* is based on this text of Manu, and therefore the only test required by the said text is "whole blood" (*ekajata*). It does not matter that subsequently one of the two brothers undergoes the spiritual change involved in an adoption. He is still an '*ekajata*' (born of the same parents) and that is sufficient for the application of the rule.

[SHAH J.—The Mitakshara is silent about this presumption.]

Yes, that is because at the time of the Mitakshara the law of adoption had not received the development which it did in later times.

[SHAH J.—What is the position of Vyasa and Mayukha in this behalf?]

The Mayukha clearly mentions the two varieties of *kevala* (simple) and *dvya* (of two fathers) and after a long discussion, aimed at proving the existence of the *kevala* variety, states its conclusion by affirming the existence of both these varieties side by side (see pp. 61-62 of Mandlik's Translation). The trend of the discussion is towards *affirming* the existence of the *kevala* variety and not towards *denying* the existence of the *dvya* kind, nay, the passages cited in the course of

1916.

LAXMIPATI-RAO v. VENKATESH.

that discussion show that the non-stipulation variety of *dvya* is not opposed to the principles accepted and enunciated by the Mayukha in the course of the said disquisition. That the said variety is not expressly mentioned in the Mayukha is due to the fact that it had not so firmly developed at that time as it did later on, and the mere omission to mention it specifically cannot be accepted as its denial, for the Mayukha has omitted to mention a number of points which are now accepted as valid developments of the law of adoption. The Dattaka Chandrika and Dattaka Mimansa clearly accept such a variety and the authority of these two treatises has been resuscitated by the Privy Council: see *Sri Balusu Gurulingaswami* v. *Sri Balusu Rama-lakshmamma*.[1] The textwriters, some of whom have been mentioned above, also recognize the variety; and the trend of decisions in Bombay is also in its favour, and distinctly recognizes the form as existing and even frequent in certain parts of this Presidency.

H. C. Coyaji with *G. P. Murdeshwar*, for respondent No. 1:—We submit that the lower Courts were right in holding that the adoption of Shrinivas was in the *kevala* form and not in the *dvyamushayana* form. The double relationship arising under the latter form can only be established by virtue of a stipulation at the time of the adoption that the boy should belong to the natural as well as the adoptive father. There is no such presumption in Hindu Law, as has been contended for by the appellant, namely, that where a sonless Hindu adopts the only son of his brother, such son becomes the son of both fathers by the bare fact of adoption without more, that is, even in the absence of any stipulation to that effect. The law as stated by Mayne, Bhattacharya and Sircar is not correct and is not borne out by the Hindu Law books, or by any judicial decisions, which are binding on us. The Mitakshara does not deal with

[1] (1899) 22 Mad. 398; L. R. 26 I. A. 113 at pp. 127—131.

the subject. It refers to a relic of the *Niyoga* system, which is now admittedly obsolete. Next in point of authority are the Vyavahara Mayukha, Dattaka Chandrika and Dattaka Mimansa. All these works found the *dvyamushayana* form of adoption on the existence of a special agreement. The Mayukha lays down that a *dvyamushayana* son is one given under the stipulation "this son belongs to us both :" vide Chap. IV, s. V, pl. 21 ; Mandlik's Hindu Law, pp. 58, 62. The Dattaka Mimansa (s. VI, para. 41) refers to two kinds of *dvyamushayana*: (1) The *nitya* ; and (2) the *anitya*. It is admitted, the modern writers state that as a fact that the *anitya* form is obsolete. The *nitya* sons are stated to be those "who are given in adoption with this stipulation : 'this son is son of us two.'" The *Dattaka Chandrika* is equally explicit. section 2, para. 24, runs thus : "Should an agreement subsist stipulating that the son adopted should be the son of the natural father and adopter likewise, a special rule for his participating in the family of both by reason of being a *dvyamushayana* will be declared." Again in para. 34 of the same section, it is stated : "And this must be understood where there may be a stipulation to this effect between the two 'this is son to us both' and such only is called a *dvyamushana* having two fathers, and belonging two familes." Again in para. 38 of the same section : "Should there be an agreement between the two, the adopted son participates in the family of both." This statement of the law has been affirmed by the Privy Council in *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra*.[1] Their Lordships observed : "Again, to constitute a *dvyamushayana* there must be a special agreement between the two fathers to that effect ; or the relation must result from some of the other circumstances indicated by Sir W. Macnaghten at p. 71 of his Principles and Precedents." The latter part of the sentence obviously refers to the

[1] (1878) L. R. 5 I. A. 40 at pp. 50, 51.

1916.

LAXMIPATI-RAO v. VENKATESH.

anitya form which is now obsolete. The case of *Nilmadhub Doss* v. *Bishumber Doss*[1] does not decide the present question. Their Lordships were considering what weight to attach to a particular fact. The observations relate to a presumption of fact and not of law. Even such a presumption of fact does not arise in the present case, since the adoption of Shrinivas had been made in 1846 and the law of the Bombay Presidency till 1875 was that an only son could be validly given in adoption. Ranade, J.'s remark in *Basava* v. *Lingangauda*[2] no doubt appears to favour the appellant, but we submit that it is merely an *obiter dictum* made without reference to the texts. There was no occasion to consider the point then. Another remark of his Lordship on a question that was under consideration then is important and seems to favour our case. That observation is that the *dvyamushayana* form is generally obsolete in the Bombay Presidency. It is proved to exist among the Lingayats. The parties in our case are Brahmins and there is no proof here that that form obtains among the Brahmins. We submit, therefore, that the presumption, even of fact, should not be lightly drawn.

Assuming that the presumption in question exists in Hindu Law, it cannot apply to an adoption made by a brother who was himself transferred by adoption to another divided branch of the family. When Hanmappa was adopted into the third branch, his connection with his natural family absolutely ceased and he became a divided cousin of his natural brother, Lakshmipatirâo: see Mayne's Hindu Law, s. 172; Dattaka Chandrika, s. 2, paras. 19 and 20; Dattaka Mimansa, s. VI, paras. 6, 7, 8; Vyavahara Mayukha, Chap. IV, s. V; Mandlik, pp. 58, 59, 61; Mitakshara, Chap. I, s. XI, para. 32. The authorities are emphatic that after adoption the filial relationship between the adopted son and the natural

(1) (1869) 13 Moo. I. A. 85. (2) (1894) 19 Bom. 428.

father is completely annulled. The son no longer performs any funeral ceremonies nor offers *pinda* to his natural father. He need not observe *sutak* (impurity on occasions of death in his natural family): see Dattaka Chandrika, s. IV, para. 1; Dattaka Mimansa, s. VIII, paras. 1 to 4. No doubt the tie of the blood (*sapinda-ship*) remains and the adopted son is in consequence enjoined not to marry in his natural family. But the adopted son is no more a *sapinda* to his natural father than a divided uncle or nephew is to the latter. The authorities go to this extent only that the adopted son remains an agnate, a blood relation, of his natural father for purposes of marriage and the like, but he ceases to be a son as such. And if the filial relationship disappears, the natural brother also ceases to be a brother. Hanamappa, on adoption, became a simple agnate of his natural brother Lakshmipatirao. Moreover, by no stretch of imagination, can it be supposed that Hanmappa and Lakshmipatirao were united brothers. And the presumption as to *dvyamushayana*, if it exists at all, would apply only to the case of united brothers and not of separated brothers: *Basava* v. *Lingangauda*.[1]

Y. N. Nadkarni for respondents Nos. 7, 9 and 10.

Coyaji with *K. H. Kelkar* for respondents Nos. 11, 12 and 13.

SHAH, J.:—It is necessary in this case to state briefly the facts out of which the present second appeal arises.

One Venkappa had four sons—Melgirappa, Konappa, Ramappa and Gurappa. These four brothers were divided many years ago. Ramappa, the third son of Venkappa had a son Hanmappa; and the fourth son Gurappa had two sons, one of whom was Kristappa. Kristappa had two sons Lakshmipatirao and Hanmappa. This Hanmappa was adopted by Ramappa's son Hanmappa. He (the adopted son of Hanmappa) had a son Shriniwasrao,

[1](1894) 19 Bom. 428.

1916.

LAXMIPATI-RAO v. VENKATESH.

and two daughters by his first wife Gangabai, and one daughter by his second wife also named Gangabai. Lakshmipatirao had no male issue and is said to have taken Shriniwasrao in adoption in the year in 1846. It is the adoption of Shriniwasrao that is in dispute in this litigation. Lakshmipatirao died in 1846 leaving a widow Lakshmibai and the boy Shriniwasrao. Hanmappa, the natural father of Shriniwasrao, died in 1852, leaving a young widow Gangabai (his second wife), and three daughters. His first wife had pre-deceased him. The surviving widow Gangabai died in 1898.

The plaintiff Timappa, who is a great-grandson of Konappa, the second son of Venkappa, filed the present suit in 1902 as a reversioner claiming Hanmappa's estate after Gangabai's death. He joined all the members of the four branches of the family of Venkappa including Hanmappa's daughters and their sons as defendants.

Defendants Nos. 1 and 2 are the sons of Shriniwasrao and are principally interested in contesting the plaintiff's claim. Defendants Nos. 3, 4, 5 and 6 are Hanmappa's daughters and their sons. Defendants Nos. 7, 8, 9 and 10 represent Melgirappa's branch. Defendants Nos. 11 and 12 belong to Gurappa's branch but to a sub-branch other than that of defendants Nos. 1 and 2, and are opposed in interest to defendants Nos. 1 and 2. Defendant No. 13 belongs to Kolappa's branch and is the brother of the plaintiff. The relationship of the parties is given in detail in the genealogical table (Exhibit 813) attached to the judgment of the lower appellate Court.

The plaintiff's claim relates to the property of Hanmappa who was adopted in Ramappa's branch. The property with which we are concerned is Watan property. The plaintiff claims to be entitled to a fifth share in the property and seeks to recover possession thereof with mesne profits after partition. His claim is

1916.

LAXMIPATI-RAO v. VENKATESH.

made on the footing that the daughters of Hanmappa cannot inherit the Watan property in consequence of the provisions of Bombay Act V of 1886, that Shriniwasrao, the natural son of Hanmappa, was given away in adoption to Lakshmipatirao, and that Shrinivasrao's sons, defendants Nos. 1 and 2, have been in wrongful possession of the property after Gañgabai's death in 1898.

It is common ground now that defendants Nos. 3 to 6 have no right to the property in question; and it is not necessary to notice the defence made on behalf of some of them in the trial Court.

Defendants Nos. 7 to 13 sided with the plaintiff, and claimed their respective shares as reversioners in the trial Court.

Defendant No. 2 did not appear. Defendant No. 1 contended, among other things, that Hanmappa (Lakshmipatirao's brother) was not adopted by Hanmappa, the son of Ramappa, as alleged by the plaintiff, that Shriniwasrao's adoption by Lakshmipatirao in 1846 was in the *dvyamushyayana* form, that their father Shriniwasrao, and, after his death in 1885, they had been in adverse possession of the property since 1852, and that the plaintiff's claim was time-barred.

The trial Court found that Hanmappa was in fact adopted by Hanmappa, son of Ramappa, that Lakshmipatirao adopted Shriniwasrao in 1846 in the simple form (as a *kevala dattaka*) and not as a *dvyamushyayana* son of himself and Hanmappa, that the property belonged to Hanmappa at the time of his death and that the claim was not time-barred. Accordingly a decree was passed in favour of the plaintiff and other defendants-sharers for partition and possession with mesne profits against defendants Nos. 1 and 2 in 1908.

1916.

LAXMIPATI-RAO v. VENKATESH.

In the appeal by defendant No. 1 to the District Court, the findings of the trial Court were affirmed except as to a part of the property. The lower appellate Court confirmed the decree of the trial Court subject to a variation as to a part of the property in 1911.

The defendant No. 1 preferred the present appeal to this Court in 1911.

As regards respondent No. 12 (Ramchandrappa) the appeal abates, as no steps have been taken in time by the appellant to bring the legal representatives of Ramchandrappa on the record, who died during the pendency of the appeal.

In support of the appeal Mr. Jayakar on behalf of the appellant has urged, firstly, that the adoption of Shriniwasrao by Lakshmipatirao must be presumed to have been in the *dvyamushyayana* form according to Hindu Law, unless a stipulation to the effect that it was to be in the simple form was alleged and proved by the plaintiff; secondly, that apart from this presumption the documentary evidence in the case establishes the fact that Shriniwasrao was a *dvyamushyayana* son of Lakshmipatirao and Hanmappa; thirdly, that the plaintiff's claim is barred on account of the property having been in the adverse possession of Shriniwasrao and defendants Nos. 1 and 2 since 1852; and, lastly, that no mesne profits should have been allowed to the defendants-sharers.

It is not disputed now that Hanmappa (brother of Lakshmipatirao) was adopted in Ramappa's branch as alleged by the plaintiff and found by the lower Courts.

It will be convenient to deal with the appellant's contentions in the order in which I have stated them.

As regards the first contention, it is based on the argument that according to Hindu Law when the only son of a brother, divided or undivided, is adopted he

becomes a *dvyamushyayana* son of both the brothers, the adopter and the giver, in the absence of a stipulation to the contrary. It is further argued that though Hanmappa became a distant cousin of Lakshmipatirao after his adoption in Ramappa's branch, he still remained the brother of Lakshmipatirao with the result that the above rule of Hindu Law would apply to Shriniwasrao's adoption. Mr. Coyaji for the plaintiff has urged that the rule of Hindu Law as stated by Mr. Jayakar has no application to the present case, as Hanmappa's natural relationship with Lakshmipatirao terminated on his adoption, and that he was related to Lakshmipatirao as a divided and distant cousin, when he gave his only son Shriniwasrao in adoption to Lakshmipatirao. In other words he maintains that Hanmappa was not Lakshmipatirao's full brother in 1846 when Shriniwasrao was given in adoption. He further contends that there is no such rule of Hindu Law as stated by Mr. Jayakar, that a *dvyamushyayana* adoption is the result of a stipulation, that the stipulation must be proved in every case by the person who relies upon such an adoption, including the case of the adoption of an only son of a brother, and that unless the stipulation constituting the boy a *dvyamushyayana* son is proved, the adoption must be held to be in the simple form.

After a careful consideration of the arguments on both sides it seems to me in the first place that Hanmappa cannot be treated as the uterine brother of Lakshmipatirao at the date of Shrinivas' adoption in 1846. It is undisputed and indisputable that Hanmappa lost all rights to the property of his natural father on his adoption in Ramappa's branch, that though the *gotra* did not change in this particular case, the degree of his relationship was altered for the purposes of inheritance and the obligation to offer oblations underwent a similar change. Manu's verse No. 142 in the 9th Adhaya of his Smriti, which is quoted with approval both in the

1916.

LAXMIPATI-RAO v. VENKATESH.

Mitakshara and the Vyavahara Mayukha is clear on the point. Mr. Jayakar, however, argues that the tie of blood or natural relationship, which is not included in the terms *gotra*, *riktha*, *pinda* or *svadha* used in the above verse, subsists even after the adoption. It is urged that for the purposes of marriage for instance the existence of the blood relationship has to be recognised and there is no reason why it should not be recognised for the purposes of adoption under such circumstances as we have in the present case. It seems to me, however, that the whole argument is opposed to the conclusions in the Vyavahara Mayukha, Dattaka Mimansa and Dattaka Chandrika. It is not suggested that there is anything in the Mitakshara bearing on this point. After referring to the above text of Manu the conclusion is thus stated in the Vyavahara Mayukha: "Even by the terms, *gotra* (family), *pinda* (funeral oblation), *riktha* (heritage), and *svadha* (Shradha, &c.) are to be understood, all the acts connected with the *pinda* or the funeral oblation due to the natural father; their extinction is pronounced. From this also follows (as a matter of course) the cessation of family connection with the uterine brother and the father's brother and the rest:" see Mandlik's Hindu Law, p. 59. It is significant that the word *sambhandha* (संबंध) is used in the original text by Nilkantha for the expression "family connection" in the translation. The conclusion is also emphasised later on at p. 61 of the book by referring to the text of Manu as involving "an entire cessation of connection with the natural father and the rest," the expression corresponding to the words "entire cessation of connection" being संबंधमात्रनिवृत्ति. Further on in the same Chapter with reference to marriage the conclusion is thus stated at p. 61 of Mandlik's Hindu Law:—"Further, a marriage in the family of the natural father within seven degrees is altogether illegal according to this text of Gautama:

'with the paternal Bandhus or kinsmen on the progenitor's side up to the seventh degree, and with those on the mother's side up to the fifth, &c.'" Thus it is clear that the natural relationship is recognised for the purpose of prohibiting marriages within certain degrees of relationship in virtue of an explicit text and opinion based thereon. The conclusions in the Dattaka Mimansa and the Dattaka Chandrika on this point are generally to the same effect [see Dattaka Mimansa, Section VI, paragraphs 6, 7, 8, 10 and 11, and Dattaka Chandrika, Section II, paragraphs 17 and 18—Stokes' Hindu Law Books, pp. 599-600 and 640, respectively]. These passages establish clearly that though the natural relationship is recognised for the purpose of prohibiting marriages within certain degrees of relationship, there is an entire cessation of connection of the adopted boy with the natural father's family after adoption. It is not necessary in this case to decide—and I am far from deciding—that the disabilities arising from the recognition of natural relationship are confined to the question of marriage. I have, however, no hesitation in holding that in spite of the natural relationship which originally subsisted between Lakmipatirao and Hanmappa, Hanmappa's natural son Shrinivas, born long after Hanmappa's adoption, would belong to Ramappa's branch, and would not be treated as Lakshmipatirao's natural brother's son as if Hanmappa had not been adopted.

This conclusion becomes clearer when regard is had to Manu's text (Manu, IX, 182) and the opinions based thereon, upoh which Mr. Jayakar has relied mainly in connection with his first contention. The opinions expressed in the Mitakshara and the Vyavahara Mayukha in favour of the brother's son are expressly based upon Manu's text (Manu, IX, 182), which has been translated as follows: "If among several brothers of the whole blood, one have a son born, Manu pronounces

1916.

LAXMIPATI-RAO v. VENKATESH.

them all fathers of male issue by means of that son." (See Stokes' Hindu Law Books, p. 424—Mitakshara, Chapter I, Section XI, para. 36.) It is quite clear to my mind that no Hindu brother can be pronounced to be a father of male issue within the meaning of this text, if a son is born to his brother, who is already given away in adoption long before the birth of the son. This text can refer only to the case of a son of a brother who is a brother of the whole blood at the time of the birth of the son, and whose connection with the family of his own birth has not ceased on account of adoption; and as pointed out by Vijnanesvara "It is not intended to declare him son of his uncle," but "to forbid the adoption of others if a brother's son can possibly be adopted."

It follows, therefore, that the very foundation which is essential for Mr. Jayakar's first contention does not exist in this case. Shrinivasrao, when born, was not Lakshmipatirao's brother's son, but his divided and distant cousin's son.

Assuming, however, in favour of the appellant that Hanmappa, in spite of his adoption in Ramappa's branch, can be treated as Lakshmipatirao's brother of the whole blood at the time of Shrinivasrao's adoption by Lakshmipati, Mr. Jayakar's contention that the adoption must be presumed to be in the *dvyamushyayana* form as a matter of law unless a contrary stipulation in favour of a simple adoption is established, cannot be accepted. I have already set forth the rival contentions of the parties on this point. Mr. Jayakar relies upon the observation in Mayne's Hindu Law (section 145, p. 185, 8th Edn.) that an only son can be adopted as a *dvyamushyayana* either by an express agreement that his relationship to his natural family shall continue or when he is the only son of a brother taken in adoption by another brother, in which case the double relationship appears to be established without

any special contract. There are similar observations in other modern books, which Mr. Jayakar has referred to. (See for example Sarkar's Hindu Law, p. 162, 4th Edn., and Tagore Law Lectures for 1888 on Adoption at p. 302.) Mr. Mayne has referred to several texts and cases in the foot-note in support of this observation ; and it will be necessary to examine them briefly to see whether in Hindu Law without proof of an agreement a brother's only son can be held to be a *dvyamushyayana* when adopted by another brother. Before I do so, however, it will be appropriate to state Mr. Jayakar's argument briefly, as it may help to restrict the scope of the examination of the texts and other authorities. His argument is that adoptions are of two forms, one simple (*kevala*) and the other *dvyamushyayana*. The *dvyamushyayana* adoptions are of two kinds *nitya* and *anitya*. According to him the *nitya dvyamushyayana* is the result of a stipulation that the boy shall be the son of both (fathers). The *anitya dvyamushyayana* is not the result of any agreement but arises when the ceremony of tonsure has been performed in the natural family of the adopted boy and when the boy belongs originally to a different *gotra*. This form of *dvyamushyayana*, it is conceded by Mr. Jayakar, is obsolete, and in any case, it has no application to the present case.

Mr. Jayakar, however, argues that the case of an only son of a brother is an exception to the general rule that there should be a stipulation in the case of a *nitya dvyamushyayana* adoption, and that in his case it should be presumed to be a *dvyamushyayana* adoption without proof of any stipulation. Thus it is necessary to consider whether such an exception is recognised in any of the texts and decided cases and whether apart from texts and precedents on principle such an exception could be recognised.

As regards the texts, the Mitakshara is silent on the point. The *dvyamushyayana* son mentioned by

1916.

LAXMIPATI-RAO v. VENKATESH.

Vijnanesvara is not the *dvyamushyayana* son which later writers refer to, and admittedly the species of a *dvyamushyayana* son referred to by Vijnanesvara is obsolete and has nothing to do with our present point.

The Vyavahara Mayukha does not refer to any such exception. It lays down that "*dattaka* or given son is of two sorts: (1) *kevala* (simple) and (2) *dvyamushyayana* (son of two fathers). The first is one given without any condition, the second is one given under the condition, that this son belongs to us both" (Mandlik's Hindu Law, p. 58). The word used for condition is *sanvid* (संविद्). Then after a long discussion about the doubt raised by some that the simple *(kevala)* adopted son does not exist, the conclusion is thus stated at p. 62:—"Thus the simple adopted son and 'a son of two fathers' being established, the *samvit* or condition (in the case of the *dvyamushyayana*) to the effect that 'he shall belong to us both' is likewise established, because (in the condition there is a visible object, namely, that) the adopter may know him to be the son of both the fathers."

There is no exception to this rule stated anywhere by Nilkantha in the chapter on adoption. The rule is stated in unequivocal terms. Mr. Mayne refers to the Vyavahara Mayukha in his foot-note, but I am unable to say that the reference supports the conclusion stated there. I attach great importance to the circumstance that the Vyavahara Mayukha recognises no such exception, as in point of authority, so far as the present point is concerned, the Vyavahara Mayukha ranks next to the Mitakshara.

The Dattaka Mimansa also fails to lend any support to the contention. The passages relied upon are Section II, paragraphs 37, 38, 44 and Section VI, paras. 34-36 and 47 and 48 (Stokes' Hindu Law Books at pp. 554, 555, 608, 609 and 612). It is really not necessary

to examine these passages in detail. They refer to the propriety or even the necessity of adopting the son of a brother, when there is one, even if he be the only son, and it is pointed out that the prohibition against the adoption of an only son does not apply to the case of a brother's only son. There is nothing in these passages, so far as I can see, to indicate whether in the opinion of the author in the case of a brother's only son there is no need for a stipulation or condition. On the contrary in Section VI, paragraph 41 there is an indication that a *nitya dvyamushyayana* adoption is the result of the "stipulation that this is the son of the two (the natural father and the adopter)." In the Dattaka Chandrika the passages referred to are Sections I—27, 28, III—17 and Section V—33 (Stokes' Hindu Law, pp. 635, 636, 650 and 661, respectively). The passages most favourable to the appellant are paragraphs 27 and 28 in Section I. No doubt the adoption of a brother's son is directed and the difficulty arising from Vasishtha's text relating to the prohibition against the adoption of an only son is avoided by a reference to the *dvyamushyayana* form of adoption in these terms :—"For the text in question is applicable to a case other than that of the *dvyamushyayana* ... the extinction of lineage contemplated in the clause of the text, containing the reason, would not take place." There is nothing to show that in the opinion of the author, there is no need for a stipulation in the case of the adoption of the only son of a brother in the *dvyamushyaayana* form.

It seems to me that these texts taken as a whole do not support the appellant's contention, but establish that in the *dvyamushyayana* form of adoption a stipulation that the boy is the son of both the adopter and the natural father is necessary. In fact such a stipulation forms the distinguishing feature of a

1916,

LAXMIPATI-RAO v. VENKATESH.

dvyamushyayana adoption, there being no other difference in the ceremony between *kevala* and *dvyamushyayana* adoptions.

Among the treatises on Hindu Law, the passage in Strange's Hindu Law, Vol. I, p. 86, no doubt appears to be in favour of the appellant. But it mainly rests upon the authority of the Dattaka Chandrika, which I have already dealt with. The passage at p. 107 of the second volume of the same work does not touch the point in question.

The passages in Steele's Law and Custom of Hindu Castes at pp. 45 and 183 refer to the prohibition to adopt "an only son, a youngest or an eldest son" and to the exception made in favour of a brother's son. But there is nothing therein which throws any light on the present point.

Sarvadhikari's treatise on the Hindu Law of Inheritance contains a reference to the subject of *dvyamushyayana* sons at pp. 533-536. It is stated at p. 535 that "if it so happened that the adopted son belonged to the family of the adoptive father—if, for instance, he was the son of a brother, then the law regarding a *dvyamushyayana* may be called into operation, and all its consequences must be strictly adhered to." The proposition is broadly stated, and it is conceded that it is true, if at all, as regards the brother's son only. But if regard is had to the context, I do not think that it can be accepted as supporting the appellant's contention. The author observes that "the son of two fathers" seldom exists in practice, and that there is a tendency to devise means to extinguish the double filial relationship altogether.

The last treatise that I need refer to is Golap Chandra Sarkar Sastri's Hindu Law. At p. 162 of the 4th edition of this book, the learned author observes that "if an only son of one brother be adopted by another brother

or his widow, he becomes, by operation of law, the son of two fathers, an express stipulation being unnecessary." The only authority cited in support of this view is the case of *Krishna* v. *Paramshri*.[1] But this case only decides that the power of giving and taking an only son in adoption in the *dvyamushyayana* form is not confined to brothers, but may also be exercised by their widows. There is no other authority cited in support of the proposition. I may here mention that the same learned author refers to Mitakshara, Ch. I, Section X, paragraphs 1 to 3, in support of a somewhat similar remark in his book on Adoption (Tagore Law Lectures for 1888). But the *dvyamushyayana* son mentioned by Vijnanesvara in this part of his commentary is quite different from the *dvyamushyayana* son we are dealing with. The *dvyamushyayana* son in the sense of the Mitakshara is obsolete now. It is also significant that at p. 376 in the same book his observations about the *nitya dvyamushyayana* and *anitya dvyamushyayana* show that in the former there must be a stipulation to that effect.

The result is that there are observations in some of these books, which support the appellant's contention. But in this Presidency we have to be guided mainly by the Mitakshara and the Vyavahara Mayukha supplemented by the Dattaka Mimansa and the Dattaka Chandrika.

These learned authors do not deal with the Vyavahara Mayukha at all, and so far as they refer to the Dattaka Mimansa and Dattaka Chandrika, I am of opinion that they are not supported by them. But above all there is no precedent in favour of their view from this Presidency, and it seems to me that it is not safe to accept their opinion on this point so far as Western India is concerned, where by far the common

[1] (1901) 25 Bom. 537.

1916.

LAXMIPATI-RAO v. VENKATESH.

form of adoption is the simple (*kevala*) form, and not the *dvyamushyayana* form. It is pertinent to note here that the view as to the prohibition against the adoption of an only son in this Presidency, which is to a large extent connected with the present point, has been somewhat different from that which obtained in other Presidencies until their Lordships of the Privy Council pronounced in favour of the validity of the adoption of an only son in 1899: see *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*.[1] This consideration also affords a reason for not accepting too readily the opinions on this point expressed in these books on Hindu Law.

I now come to the decided cases, which Mr. Mayne refers to, and some of which have been referred to in the course of the argument. The most important is the case of *Shrimati Uma Deyi* v. *Gokoolanund Das Mahaptra*.[2] Their Lordships after referring to certain passages in the Dattaka Mimansa and Dattaka Chandrika, concede that "they do in terms prescribe that a Hindu wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father, by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other person as a *dvyamushyayana*, or son of two fathers." The point that was decided was that the directions contained in these texts were not mandatory and that an adoption though not in conformity with them, was valid. So far it seems to me that their Lordships do not consider or decide the point, which we have to decide in this case. But further on their Lordships observe as follows:— "Again, to constitute a *dvyamushyayana* there must be a special agreement between the two fathers to

(1) (1899) L. R. 26 I. A. 113. (2) (1878) L. R. 5 I. A. 40 at p. 50.

that effect; or the relation must result from some of the other circumstances indicated by Sir William Mac-Naghten at p. 71 of his Principles and Precedents."

The passage at p. 71 of this book shows that a *dvyamushyayana* adoption "may take place either by special agreement that the boy shall continue son of both fathers, when the son adopted is termed *nitya dvyamushyayana*; or otherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated *anitya dvyamushyayana*." Thus the observations of their Lordships of the Privy Council instead of favouring the appellant's contention, favour the view that a *nitya dvyamushyayana* adoption can take place only by special agreement to that effect. No exception to this rule is mentioned either in the judgment or in Sir William Mac-Naghten's Principles and Precedents, apart from *anitya dvyamushyayana* adoption which stands on a different footing altogether.

The other case is the case of *Nilmadhub Doss* v. *Bishumber Doss*.[1] The question that their Lordships had to decide was, as observed at p. 97 of the report, whether the respondents in the case had established that there was, in fact, an adoption of Ramlochan Dass by Gooprooprashad Dass. On a consideration of the evidence their Lordships held against the respondents. The question to be considered was purely one of fact, and the presumptions referred to at pp. 100 and 101 of the report are presumptions of fact and not of law. The presumption that no sonless Hindu will fail to adopt a son or to make provision for an adoption is not strong, and the other presumption that he would not break the law by giving in adoption an eldest or only son or allowing him to be adopted otherwise than as a *dvyamushyayana* or son to both his uncle and his

[1] (1869) 13 Moo. I. A. 85.

1916.

LAXMIPATI-RAO v. VENKATESH.

natural father referred to in contrast with the first, cannot be treated as much stronger than the first. These observations must be taken with reference to the context and cannot be properly taken out of their context and treated as propositions of law. Their Lordships have decided in the case already referred to that these rules of law are not mandatory but merely directory. It may be that in appreciating evidence as to the fact of a particular adoption, the Court may be satisfied with less proof in the case of an eldest or only son of a brother than in any other case in deciding whether that adoption was in the *dvyamushyayana* form or not. But the case cannot be treated as deciding that, as a matter of law there can be a *dvyamushyayana* adoption without a stipulation or condition to that effect between the giver and the adopter, when both of them are brothers and when the boy happens to be the only son of the giver.

The other cases referred to by Mr. Mayne do not carry the point any further and need not be discussed. It will be enough to state that the decision in *Permaul Naicken* v. *Pottee Ammal* [1] is based upon the remark in Strange's Hindu Law, Vol. I, p. 86, which I have already dealt with.

There is no decision of this Court bearing on this point. Certain observations of Ranade J. in the case of *Basava* v. *Lingangauda* [2] have been relied upon. But I feel quite clear on a consideration of these observations that they do not touch the point in question; and that there was no occasion then to consider the present point. It is significant that Mr. Justice Ranade refers to this form of adoption as having become generally, if not altogether, obsolete in this Presidency. The result of all these decisions taken together seems to me to support the conclusion that a *nitya*

[1] (1851) S. D. A. R. (Mad.) 234. [2] (1894) 19 Bom. 428.

dvyamushyayana adoption is always the result of an agreement to that effect, and that there is no exception to the rule.

If we consider the question apart from texts and precedents, it is clear that there is really no foundation for the appellant's contention. The theory is that according to certain texts of Hindu Law the adoption of an only son is absolutely prohibited. How is the adoption of a brother's only son, who would naturally and obviously be the most suitable boy to adopt, if he were otherwise eligible, to be justified? The only way that the commentators could suggest was the one which in fact they did suggest, viz., that the adoption could be in the *dvyamushyayana* form. But the supposed prohibition of the adoption of an only boy no longer exists. Therefore there is nothing to be avoided while giving an only son, or even an only son of a brother, in adoption. Besides the direction as to adopting a brother's son in preference to any other boy has been held long since to be a recommendation and not an imperative command; and there is no reason to suppose that the direction as to adopting a brother's son has been ever treated in this Presidency as anything more than a recommendation. Under these circumstances there would be no ground for presuming that the only son of a brother, if given in adoption, must be deemed to be given as a *dvyamushyayana* son. It is open to that brother to give his only son in adoption to a stranger if he chooses. It is equally open to him to give him to his own brother, if so minded. The pressure upon his conscience, if any, would be much the same in either case from the point of view of Hindu sentiment. If there is need to prove an agreement to support the plea of a *dvyamushyayana* form of adoption in one case, there is in my opinion equal need for proof of such an agreement in the other case.

1916.

LAXMIPATI-RAO v. VENKATESH.

On a careful consideration of all the arguments for and against this point, I have come to the conclusion that in every case of a *dvyamushyayana* form of adoption, there must be an agreement to that effect, and that the agreement must be proved by the person setting up the *dvyamushyayana* adoption, like any other question of fact, as much in the case of the adoption of an only son of a brother as in any other case of such an adoption. I refer here of course to the case of a *nitya dvyamushyayana*. An *anitya dvyamushyayana* is undoubtedly independent of an agreement; but with that we have nothing to do in this case.

The second contention relates to the question of fact. Mr. Jayakar has urged that having regard to Exhibits 835, 833, 834, 144 and 120, it is clear that the adoption of Shrinivas was in the *dvyamushyayana* form. Both the lower Courts have considered this and other evidence and arrived at the conclusion that the adoption of Shrinivas was in the simple form and not in the *dvyamushyayana* form. These documents have been read to us, and I am unable to say that the finding of fact is not justified. There is no evidence of any stipulation between Lakshmipatirao and Hanmappa that Shrinivas was to be the son of both of them. The *yadi*, which is in the nature of a will, of Lakshmipatirao (Exhibit 835) made in 1846 does not refer to any such stipulation. There is nothing to show that Hanmappa treated Shrinivas as a *dvyamushyayana* son during his life-time up to 1852. The statements of Lakshmibai, Shrinivas and Gangabai after Hanmappa's death do not establish the plea of a *dvyamushyayana* adoption. There is no reason to suppose that the presumption mentioned by their Lordships of the Privy Council in *Nilmadhub's* case[1] above referred to has not been properly considered by the lower Courts in appreciating this evidence. Further with reference to this

[1] (1869) 13 Moo. I. A. 85.

presumption it has to be remembered, as pointed out by Sir Charles Sargent, Chief Justice, in the Full Bench case of *Waman Raghunath Bova* v. *Krishnaji Kashiraj Bova*,[1] "that up to the time when *Lakshmappa* v. *Ramava*[2] was decided, with the exception of the opinion expressed by Sir Joseph Arnould.....the adoption of an only son had been regarded by the late Sadar Adalat and by this Court as valid." The case of *Lakshmappa* v. *Ramava*[2] was decided in 1875 and the opinion of Sir Joseph Arnould was expressed in 1869. The presumption, therefore, cannot be said to be particularly strong in favour of the appellant. For all these reasons, I think the concurrent finding of the lower Courts on this point must be accepted by us in second appeal.

The next contention relates to the plea of limitation. This suit is admittedly governed by Article 141 of the Limitation Act of 1877, and the suit filed in 1902, within four years of the widow's death, would be in time. The reversioners would not be affected by any adverse possession against the widow during her life: see *Runchhordas Vandrawandas* v. *Parvatibhai*.[3] But it is argued for the appellant that before the Limitation Act of 1871 came into force, the title to this property was acquired by Shrinivasrao and the right to sue him had become barred within the meaning of section 2 of Act XV of 1877, in virtue of the Limitation Act XIV of 1859, on account of Shrinivasrao's adverse possession for over twelve years. The lower Courts have found that assuming Shrinivasrao's possession to have commenced in 1852, it was not adverse to the widow Gangabai and that her right to sue him had not become barred in 1873 when the Limitation Act of 1871 came into force, and when Article 142 entitling a Hindu reversioner to sue within twelve years from the date of the widow's death was

(1) (1889) 14 Bom. 249 at p. 257. (2) (1875) 12 Bom. H. C. R. 364.
(3) (1899) L. R. 26 I. A. 71.

1916.

LAXMIPATI-RAO v. VENKATESH.

introduced for the first time in the Limitation Act of 1871. Mr. Jayakar has relied upon the same documents (Exhibits 833, 834, 144 and 120) and an order (Exhibit 846) made on the Mamlatdar's report, as showing that the possession of Shrinivas must be held to be adverse to Gangabai since 1852. This again is largely a question of fact. Though several cases have been cited in the course of the argument it is not necessary to refer to them. Both the lower Courts have come to the conclusion that the possession of Shrinivas was not adverse. Having regard to the fact that Gangabai was a young widow about 20 years old in 1852, it was quite natural that she would like the management to be carried on by Lakshmibai, who was about 32 years old then or by Shrinivas who was about 18 years of age. It did not matter to her that the Revenue authorities at the time declined to recognise Shrinivasrao's adoption by Laxmipatirao and entered Shrinivas' name in the revenue records in place of Hanmappa's name as his natural son. Out of all the agnates in the family, she would naturally turn to Lakshmipatirao's branch for assistance after Hanmappa's death. The statements above referred to show that Gangabai believed that she was an heiress to the property of Hanmappa and consented to the management by Lakshmibai. It would not matter to her whether Lakshmibai managed the property or Shrinivas did so. They all agreed at the time as to the management of the property, and there is no reason to suppose that the management was assumed by Shrinivas in 1852 in derogation of Gangabai's rights. Under the circumstances Shrinivas must be deemed to have been in possession of the property with the consent of Gangabai. There is nothing to show that the possession, which was permissive in the beginning became adverse more than twelve years before the Limitation Act of 1871 came into force. The earliest overt act, of which there

is evidence, is the mortgage of 1862 effected by Shrinivas. There is nothing to show that Gangabai had notice of this act or that under the circumstances it was necessarily of such a nature as to alter the character of the possession. But this is well within twelve years prior to the Act of 1871. The Court would be slow to hold that possession which has commenced lawfully has subsequently become adverse to the rightful owner unless the evidence clearly and unequivocally establishes the fact. There is nothing in the subsequent conduct of the parties or in the evidence to justify the inference that the permissive possession of Shrinivas became adverse to Gangabai more than twelve years before April 1873. Mr. Jayakar has argued that the possession, if shown to have been adverse in 1862, should be presumed to be adverse even prior to 1862. But I am quite unable to accept this argument. It is clear to my mind that the possession was permissive in 1852 and is not shown to have become adverse at any time for more than twelve years prior to April 1873. Thus assuming in favour of the appellant that prior to the Act of 1871 any adverse possession against the widow would be effective against the reversioners it is not shown that the widow's right to sue was barred under clause 12 of section 1 of Act XIV of 1859 before April 1873.

Mr. Coyaji has contended that having regard to the provisions of Bombay Regulation V of 1827, under which no title by prescription could be acquired without enjoyment of the immoveable property for thirty years, as also to the absence of any section in Act XIV of 1859 corresponding to section 28 of Limitation Act XV of 1877, the defendant No. 1 or rather Shrinivasrao could not be said to have acquired a title to the property within the meaning of section 2 of Act XV of 1877 before April 1873. He relies upon *Rangacharya* v.

1916.

LAXMIPATI-RAO v. VENKATESH.

Dasacharya.[1] Shrinivasrao's possession commenced in 1852 and he had not enjoyed the property for more than thirty years in 1873. It is also contended by Mr. Coyaji that even if the widow's right to sue may have been barred in 1873, the plaintiff's right to sue could not be treated as barred within the meaning of section 2 of Act XV of 1877, as the plaintiff claims as a reversioner in his own right and not under the widow. Thus his argument is that even if the possession of Shrinivas be adverse to the widow for over twelve years prior to April 1873, Shrinivas had acquired no title to the property and plaintiff's right to sue was not barred in April 1873 within the meaning of section 2 of Act XV of 1877. It is really not necessary to consider this argument any further in view of the conclusion I have arrived at on the question of adverse possession. But I am not at all sure that the plaintiff's right to sue can be treated as barred, if the widow's right to sue was barred before 1873, within the meaning of section 2 of Act XV of 1877, as contended by Mr. Jayakar and assumed by the lower Courts: see *Lala Soni Ram* v. *Kanhaiya Lal*.[2]

Lastly as regards mesne profits, apparently no objection was taken in the lower appellate Court to the decree of the trial Court on this point. The only ground upon which the claim of the defendant-sharers to mesne profits is now resisted is that they were not claimed by the sharers in their written statements. I do not think that it would be just to construe the pleadings strictly as contended by Mr. Jayakar. The defendants-sharers claimed their respective shares and it seems to me that on the pleadings it was open to the trial Court to allow mesne profits to all the sharers. The appellant has acquiesced in this decree in the lower

(1) (1912) 37 Bom. 231. (2) (1913) L. R. 40 I. A. 74.

1916.

LAXMIPATI-RAO v. VENKATESH.

appellate Court. I do not see any reason to disallow the mesne profits which have been allowed by the trial Court.

The result is that all the contentions in support of the appeal fail, and that the decree of the lower appellate Court is affirmed with costs.

BATCHELOR, J.:—I concur both in the conclusions and in the reasons of my learned colleague.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

1916. *September* 28.

NARO GOPAL KULKARNI (ORIGINAL DEFENDANT No. 1) APPELLANT *v.* PARAGAUDA BIN BASAGAUDA AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT No. 2) RESPONDENTS.*

Hindu Law—Joint family Property—Alienation by father—Suit by sons to set aside alienation—One of the sons born after alienation—Whether his interest bound—Time-barred debt acknowledged by registered deed—Undue influence—Father's interest bound by the deed—Time when the share is ascertained.

The plaintiffs P and B and defendant No. 2 their father constituted a joint Hindu family. On September 19, 1901, defendant No. 2 sold certain family land to defendant No. 1. Plaintiff B was born subsequently to the date of the alienation and was a minor when the suit was filed. The plaintiffs sued to set aside the sale deed on the ground that it was taken from defendant No. 2 by undue influence and for no consideration. The Subordinate Judge dismissed the plaintiffs' suit holding that the consideration for the deed was an antecedent debt which though barred by time was acknowledged by defendant No. 2 by a registered deed which was binding on the plaintiffs. The lower appellate Court reversed the decree and directed that plaintiffs and defendant No. 2 be restored to possession. On appeal to the High Court by defendant No. 1, the question was raised whether the time-barred debt acknowledged by the

*Appeal No. 43 of 1915 under the Letters Patent.