APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

HUCHRAO TIMMAJI DESHPANDE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* BHIMARAO GURURAO DESHPANDE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1917. *September* 11.

*Hindu Law—Adoption—*Dvyamushyayana *form—Presumption—Suit to recover arrears of* Deshpandegiri *cash allowance—Three years arrears can be recovered—Limitation Act (IX of 1908), section 7.*

Under Hindu law, in the absence of any express agreement to the effect that the adoption was to be in the *Dvyamushyayana* form, it must be presumed to be an ordinary adoption.

Laxmipatirao v. *Venkatesh*[1], followed.

Two plaintiffs, one of whom was a minor, being jointly entitled to a Deshpandegiri cash allowance, sued to recover arrears for six years prior to the suit:

Held, that the plaintiffs were entitled to recover the arrears for three years only, for the minority of the second plaintiff could not help the plaintiffs inas much as the adult plaintiff was in a position to give a discharge on behalf of himself as well as the minor.

Ganpat v. *Sheshgiri*[2], distinguished.

SECOND appeals from the decision of W. T. W. Baker, District Judge of Bijapur, varying the decree passed by D. V. Yennemadi, Subordinate Judge at Bijapur.

Suit to recover arrears of a Deshpandegiri cash allowance.

Three brothers, Bhimrao, Katappa and Timmaji (defendant No. 1) were entitled to the allowance in question. Bhimrao owned an eight annas share in it; whilst his two brothers had a four annas share each. Bhimrao adopted Gururao, who was the only son of his brother Katappa.

The plaintiffs, who were the sons of Gururao, claimed that by virtue of the adoption they were entitled to

* Joint Appeals Nos. 327 and 395 of 1914.

(1) (1916) 41 Bom. 315. (2) (1904) 6 Bom. L. R. 647.

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Bhimrao's share of eight annas; they also claimed the four annas share of Katappa, as they alleged that Gururao's adoption by Bhimrao was in the *dvyamushyayana* form. Of the two plaintiffs, one was a minor. They claimed to recover arrears for six years preceding the suit.

The Subordinate Judge held that the plaintiffs were only entitled to Bhimrao's share of eight annas, for Gururao's adoption was in the ordinary form; and he allowed their claim for arrears for six years, following *Ganpat* v. *Sheshgiri*[1].

On appeal, the District Judge was of opinion that the adoption was in the *dvyamushyayana* form and held that the plaintiffs were entitled to a twelve annas share inclusive of Katappa's share. The rest of the decree appealed from was confirmed.

The defendants appealed to the High Court.

Coyaji with *G. S. Mulgaokar* for the appellants.

Jayakar, with *K. H. Kelkar* and *R. A. Jahagirdar*, for the respondents.

SHAH, J.:—The first point urged in support of these appeals relates to the share of the plaintiffs in the cash allowance in dispute. The plaintiffs contend that they are entitled to three-fourths of the whole allowance and the defendants contend that the plaintiffs are entitled only to one-half. This point entirely depends upon the question whether the plaintiffs' father Gururao was adopted by Bhimrao in the *dvyamushyayana* form or in the ordinary (i. e. *kevala*) form. The trial Court found that he was adopted in the simple form and not in the *dvyamushyayana* form. The appellate Court, however, came to the conclusion that he must be presumed to be the *dvyamushyayana* son of Bhimrao and Katappa. The learned District Judge, however,

(1) (1904) 6 Bom. L. R. 647.

has pointed out that there is no evidence of any stipulation that Gururao was to be treated as the son of both fathers made at the time of the adoption; but he relied upon a certain observation in Sarkar's Hindu Law and the case of *Krishna* v. *Paramshri*[1] cited by the learned author in support of his observation. This observation and the case referred to by the lower appellate Court were considered in the case of *Laxmipatirao* v. *Venkatesh*[2] and for the reasons given there we are of opinion that in the absence of any express agreement to the effect that the adoption was to be in the *dvyamushyayana* form it must be presumed to be an ordinary adoption. It is clearly stated by the lower Court that there is no evidence of any such stipulation. It is urged in support of the view taken by the lower appellate Court that the property has been enjoyed in a manner which would show that Gururao was treated as a *dvyamushyayana* son. There is no evidence, however, to that effect; and it is not denied that the allowance in question has never been divided before on the footing of Gururao being a *dvyamushyayana* son. The lower appellate Court has proceeded on a certain admission supposed to have been made by the defendant No. 1 (Exhibit 105). But the statement of the defendant is clear that the property has been enjoyed half and half. In any case it is sufficient that there is no evidence whatever of the adoption of Gururao having been made in the *dvyamushyayana* form. The conclusion of the lower appellate Court on this point cannot be accepted.

The result is that the plaintiffs are entitled only to a half share in the cash allowance.

The second point relates to the arrears of the allowance. The plaintiffs claim arrears for six years and

(1) (1901) 25 Bom. 537.

(2) (1916) 41 Bom. 315.

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the defendants contend that the arrears for three years only should be allowed. Both the lower Courts have allowed arrears for six years. It is clear that the plaintiffs were jointly entitled to sue and that plaintiff No. 1 was in a position to give a discharge on behalf of himself as well as his minor brother plaintiff No. 2 within the meaning of section 7 of the Indian Limitation Act. The minority of plaintiff No. 2, therefore, cannot help the plaintiffs. Mr. Kelkar has not been able to cite any authority in support of the view that an elder brother, who is in the position of a manager of a joint Hindu family, cannot give a valid discharge without the concurrence of his minor brother, who is joint with him in interest. The case of *Ganpat* v. *Sheshgiri*[1] referred to by the lower Courts is a case of joint decree-holders, which stands on a somewhat different footing. It follows that the plaintiffs are entitled to arrears for three years only.

The result, therefore, is that the decree of the lower appellate Court is reversed and that of the trial Court restored subject to the modification that the defendants are to pay Rs. 243 instead of Rs. 486 as arrears of cash allowance.

The parties to bear their own costs throughout.

Decree reversed.

R. R.

[1] (1904) 6 Bom. L. R. 647.