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Court in *Mána Bayáji* v. *Pánduraug Vásudev*[1]. In that case, the circumstances of which were, to some extent, similar to those of the present case, this Court refused to exercise its extraordinary jurisdiction on behalf of the plaintiff, as, having regard to the close relationship existing between the defendants in the first suit and the plaintiff in the second, the Court was of opinion that, in all probability, an inquiry into the merits of the second suit would not really result in a decision in the plaintiff's favour. But no such relationship exists between the defendants in the former proceedings, in which the present defendant was the plaintiff, and the plaintiff in the present case; and, on such material as there is before us, it is impossible for us to form any opinion as to the probable success of the present suit, if it were now inquired into on its merits. We reverse the order of the Mámlatdár, and direct that the case be heard. Costs to follow the final decision.

Order reversed.

(1) I. L. R., 9 Bom. 97

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

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DHARMA' DAGU, (ORIGINAL DEFENDANT), APPELLANT, *v.* RAMKRISHNA CHIMNA'JI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Adoption of a married asagotra Bráhman—Validity of such adoption—Factum valet.

The adoption of a married *asagotra* Bráhman is not prohibited by the Hindu law in force in the Presidency of Bombay. The circumstance that there was a person better qualified than the adoptee would not by itself render such adoption invalid, or prevent the principle of *factum valet* from applying. Where a rule is in effect *directory* only, an adoption contrary to it, however blameable, is nevertheless, to every legal purpose, good.

THIS was a second appeal from the decision of M. B. Baker, District Judge of Dhulia.

The plaintiff, who was the adopted son of one Anpurnábái, sued the defendant upon a lease alleged to have been executed by the defendant to the adoptive mother of the plaintiff, on the

* Second Appeal, No. 286 of 1883.

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8th January, 1877, and sought to recover from the defendant the land in dispute.

The defendant denied the execution of the lease, and, among other things, impeached the fact and validity of the plaintiff's adoption. He contested the validity of the adoption on two grounds, *viz.*, that the plaintiff was an orphan at the date of adoption, and, secondly, that the plaintiff was not a *sagotra* of the adoptive parent, and was a married man, having children at the date of his adoption.

The Subordinate Judge of Nandurbár, in the Khándesh District, found the lease to be genuine, overruled the defendant's objections, and awarded the plaintiff's claim.

The defendant appealed to the District Judge of Dhulia, who confirmed the lower Court's decree.

The defendant preferred a second appeal to the High Court.

Ganesh Rámchandra Kirloskar for the appellant.—The plaintiff being a married man, having children at the date of the alleged adoption, was not eligible for adoption. The adoption of an *asagotra* married Bráhman, as the plaintiff was, is invalid. In the case of *Lakshmáppa* v. *Rámáva*[1] such adoption was questioned. Such an adoption is not good, for by Hindu law certain religious ceremonies are essential to the affiliation of a boy, and marriage is the last of these. After marriage these ceremonies cannot be performed in the adoptive family. A Bráhman, whose *upanayana* ceremony has been performed already, is not a fit object of adoption—see *P. Venkatesaiyá* v. *M. VenkatáChárlu*[2]. A passage in Kálikápurán says that a boy whose thread ceremony has been already performed cannot be adopted, much less so can one who is married—see Mayukh, ch. iv, sec. 5, pl. 20; Strange's Hindu Law, Vol. II, p. 231; Steel, pp. 43, 44, 182. If the adopter and the adoptee belong to different *gotras*, the marriage of the adoptee is a bar to his adoption—1 Borrodaile, p. 195; Macn. Hindu Law, Vol. I, p. 75; Cowell's Lectures, p. 339; Strange's Hindu Law, Vol. II, pp. 63, 85 and 130.

(1) 12 Bom. H. C. Rep., p. 364.

(2) 3 Mad. H. C. Rep., 28.

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Dáji Abáji Khare for the respondent.—The express prohibition of a married person for the purpose of adoption is prevalent and binding in the Presidency of Madras, and is based on Dattaka Mimánsá and Dattaka Chandriká, which are not the paramount authorities in the Bombay Presidency—see West and Bühler, p. 10. The case of *Lakshmáppa* v. *Rámáva*[1] is an authority for the adoption of a married Bráhman; Vyavahár Mayukh sanctions such an adoption—see Stokes' Hindu Law Books, p. 64; Steel, p. 44, ed. of 1868. Adoption of a married man of whatever age is not expressly prohibited by Mitákshara. In this case the maxim *factum valet* applies.

BIRDWOOD, J.—The principal question raised by this appeal, and the only one argued before us, has reference to the validity of the plaintiff's adoption by the deceased Anpurnábái, which has been called in question on the ground that he and Anpurnábái were Bráhmans, belonging to different *gotras*, and that, at the time when he was adopted by her, in 1877, he was a married man, with children. It is contended that, among Bráhmans, such an adoption is illegal, and that the plaintiff cannot be helped by the maxim *factum valet*.

The question has been decided by both the Courts below in the plaintiff's favour. So far as we are aware, the same question has not been decided, in any previous case, by this Court. In *Sadáshiv Moreshvar* v. *Hari Moreshvar* it was raised, but not considered, as the Court was of opinion that the defendant Sadáshiv was estopped by his conduct from disputing the plaintiff's adoption. In *Náthájí Krishnáji* v. *Hari Jagoji*[3] the Court had previously held that the adoption of a married Sudra was not invalid, if he was a *sagotra* of the person adopting. In that case, the adoption was objected to on the strength of a passage in the Dattaka Chandriká (Sec. II, §29), which lays down that adoption must be performed previously to investiture in the case of persons of a regenerate tribe, and previously to marriage in the case of Sudras. That doctrine was affirmed, as regards Bráhmans, by the Madras High Court in *P. Venkatesaiya* v. *M. Venkatá Chárlu*[4], but was not adopted, as regards Sudras,

(1) 12 Bom. H. C. Rep., p. 364.
(2) 11 Bom. H. C. Rep., 190.
(3) 8 Bom. H. C. Rep., A. C. J., 67.
(4) 3 Mad. H. C. Rep., 28.

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in *Náthájí's* case, in which, after referring to the passage on the subject in the Mayukh (Chapter IV, Sec. V, §§ 19, 20), and to the important decision in the *Mahúráj* case[1], and to *Rúje Vyankatráv A. Nimbálkar* v. *Jayavantráv*[2], Melvill, J., remarked that, "independently of Hindu law," there was sufficient authority for holding that adoptions of married persons having families "are, in the Deccan, recognized by the custom of the country.

In *Lakshmáppá* v. *Rámáva*[3] the Court held that the adoption even of an *asagotra* married Sudra was not invalid by Hindu law as administered in Western India; but, having regard to the circumstance that, in the *Mahúráj* case[1], reported in I Borr., p. 181, the adoption held to be valid was that of a Bráhman, who was a *sagotra* of the adoptive mother, the Court was careful to express no opinion on the question whether the adoption of an *asagotra* married man of any of the three twice-born classes would be valid or otherwise. The judgment in *Lakshmáppá's* case[3], however, distinctly upholds the doctrine that, whether among Sudras or Bráhmans, an adoption is not invalid merely because the adopted son is married, although, no doubt, among Bráhmans, if a boy eligible in other respects can be obtained, upon whom the *chudákarma* and *upanayana* ceremonies have not been performed in his natural family, "he is to be preferred for adoption to one upon whom they have been performed;" it always being understood, however, that ceremonies can be annulled if this rule is broken, and that an adoption, contrary to the rule, is not, therefore, invalid.* "If marriage," observes Nánábhái Haridás, J., "because incapable of annulment, disqualifies a Sudra for adoption, it must equally, on that ground, disqualify a Bráhman for that purpose. But we fail to find it mentioned as a disqualifying cause either by Manu, Kulluka Bhatta, Yájnavalkya or Vijnáneshvara, or by any of the other authorities of weight in this Presidency. On the contrary, we find the Dharma

(1) 1 Borr., 181. (2) 4 Bom. H. C. Rep., A. C. J., 191.
(3) 12 Bom. H. C. Rep., 364.

* *Note.*—The authors of the Digest of Hindu Law express a doubt whether the license to annul the tonsure and investiture ought to be recognized in Bombay. The Shástris appear to be generally opposed to it, although, in *Lakshmáppá's* case, it was looked on with favour. See West and Bühler, 3rd ed., 930.

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Sindhu, the Sanskára Kaustubha, and the Vyavahára Mayukha distinctly recognizing the adoption of a married man, the latter even going a step beyond the other two, and laying it down that a married man, who has even had a son born, may become an adopted son; and, accordingly, in the case of *Shri Brijbhukunji Mahárâj* v. *Shri Gookoolootsavji Mahárâj* (1), the adoption of a married Bráhman of the age of forty-five and having a family was considered a good adoption. The argument, therefore, based upon the assumed invalidity of a married Bráhman's adoption falls to the ground."

This exposition of the law simplifies materially the question for consideration in the present case. It is only necessary for us now to decide whether a Bráhman, who is married, and is, therefore, already regenerate, can be translated by adoption into a new *gotra*, in which he can perform ceremonies which will have the effect of annulling those performed in his natural family. The answer to this question must depend on the construction to be put on the passage in the Mayukha, referred to in the judgments of this Court in the cases of *Náthâji Krishnâji* v. *Hari Jagoji* (2) and *Lakshmíppá* v. *Rámáva* (3); for the authority of Nilkantha, "especially when not opposed to Vijnáneshwara's, is supreme in this Presidency." See *Lakshmáppá* v. *Rámáva* (4); also *Náráyan Bábáji et al* v. *Náná Manohar et al* (5). The only difficulty in dealing with the question seems to arise from the quotation by Nilkantha, with his own explanation of it, of a text from the Káliká Purâna adverse to the adoption of a son whose ceremonies up to tonsure have been performed with the *gotra* or family name of his father, or who is given after his fifth year. Nilkantha explains that this text "relates to those belonging to different *gotras* or families." But it does not, we think, follow that, because he explains the text, and comments on it, he, therefore, adopts it. No doubt, in the *Mahárâj* case (6), the Shástris seem to have accepted the text, with its explanation, as a correct statement of the law. Their answer to the sixth question put to

(1) 1 Borr., 181.
(2) 8 Bom. H. C. Rep., A. C. J., 67.
(3) 12 Bom. H. C. Rep., 364.
(4) 12 Bom. H. C. Rep., at p. 371.
(5) 7 Bom. H. C. Rep., A. C. J., 153.
(6) 1 Borr., 181.

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them, so far as it has a bearing on the present case, was in these terms:—"It is also stated that a boy under five years of age should be adopted, in order that he may be brought up in the religious tenets of his adoptive father. This relates to cases where no relationship subsists; but when a relation is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family, provided he possess common ability, and is beloved by the person who adopts him" (1). This is clearly an amplification of the comment of Nilkantha on the text of the Káliká Purána. So far as it implies that the adoption of a boy over five years of age, who is not a relation of the adoptive father is illegal, it seems to be opposed to the remark of Nilkantha that "much reliance is not to be placed" on the passage in Káliká Purána, which is the authority for the proposition. It is expressly stated in the Mayukha, that the passage "is not to be found in two or three copies of Káliká Purána." And Ráv Sáheb V. N. Mandlik adds, in a note to his edition of the Mayukha, that the Sanskára Kaustubha similarly does not recognize it as genuine. Its genuineness is not only questioned by Nilkantha, but, as remarked in *Lakshmáppá* v. *Rámáva* (2), has been "denied by Devanda Bhatta (Dattaka Chandriká, Sec. II, 25), and 'justly denied,' according to Sutherland." We hold with the learned Subordinate Judge, whose opinion was concurred in by the District Judge, that Nilkantha never intended to adopt the doctrine of the Káliká Purána; but that, after stating and explaining the text quoted by him, he really adhered to the rule, broadly laid down by him, at the beginning of the passage in Chapter IV, Section V: "According to my venerable father, even one married and the father of a male issue is fit for adoption. And this is proper, since there is nothing opposed to it" (Mandlik's Vyavahára Mayukha, Translation, p. 58). There is nothing in the whole passage, as we read it, to restrict the appliation of this rule to *sagotras*. Nor has any text been pointed out to us in the Mitákshara which modifies the rule. It appears also from Steele's Law and Customs of Hindu Castes that "the Poona Shástris do not recognize the necessity that adoption should precede *munj* and marriage." The reason given is that the passage "so inter-

(1) 1 Borr., 217, ed. of 1862. (2) 12 Bom. H. C. Rep., at p. 372.

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preting the law is said by the author of the Mayukha to be an interpolation"[1]. In the third edition of the Digest of Hindu Law, two answers of Shástris are referred to. In one, the adoption by a Bráhman, of a boy of a different *gotra*, whose *munj* had been performed, was pronounced quite legal and effectual. In the other, an instance of such an adoption, said to be given in the Veda, was relied on[2]. We must hold, therefore, that the adoption of a married *asagotra* Bráhman is not prohibited by the Hindu law in force in this Presidency; though, as we observed before, (relying on the judgment in *Lakshmáppá* v. *Rámáva*[3]), "there is authority for saying that if a boy eligible in other respects can be obtained, upon whom" the *chudákarma* and *upanayana* "ceremonies have not been performed in his natural family, he is to be preferred for adoption to one upon whom they have been performed."

Such being the state of the law, we must hold that, even if there was any person who ought to have been preferred for adoption to plaintiff, and as to that point we have no information, still the plaintiff would be helped by the maxim *factum valet*; for an adoption, contrary to the rule, would not on that ground be invalid; and the ceremonies could be anulled[3]. The rule is, in effect, *directory* only, and an adoption, contrary to it, "however blameable in the giver, would, nevertheless, to every legal purpose, be good"[4]. In *Ráje Vyankatráv A. Nimbálkar* v. *Jayavantráv*[5] it was remarked by Gibbs, J., that "the rulings of this Court, as shown from 2 Borr., p. 63 downwards, as also of the Calcutta Courts, have been that an adoption once made cannot be set aside. If the adopted be not a proper person, the sin lies on the giver and receiver alone; but the adoption must stand." In *Lakshmáppá* v. *Rámáva*[6] a restriction was placed on the operation of the maxim *factum valet* in cases of adoption. It was there said by Westropp, C.J., that "its application must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction of adoption. In cases in which the Shástra is merely directory, or only points out par-

(1) Steele's L. and C., 44.
(2) West and Bühler, p. 1063.
(3) 12 Bom. H. C. Rep., at p. 370.
(4) 1 Sir T. Strange, 87.
(5) 4 Bom. H. C. Rep., p. 191, A.C.J.
(6) 12 Bom. H. C. Rep., at p. 398.

ticular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the precept or recommended preference be disregarded." This view was held in *Gopál Nárhar Safray* v. *Hanmant Ganesh*(1) to be in complete accordance with *Srimati Umá Devi* v. *Gookoolanund Dás Mahápatra*(2), in which the Privy Council upheld the adoption of a remote relative, not a *sapinda* of the adoptive father, in disregard of the preferential claim of the son of a brother of the whole blood. After referring to Sir Thomas Strange's statement, that the result of all the authorities was "that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who, upon spiritual considerations, ought to have been preferred," and to Sir William Macnaghten's statement, that "the injunction to adopt one's own *sapinda* (a brother's son is the first) and, failing them, to adopt out of one's own *gotra*, is not essential, so as to invalidate the adoption, in the event of a departure from the rule," their Lordships of the Privy Council felt "that it would be highly objectionable on any but the strongest grounds to subject the natives of India in this matter to a rule more stringent than that enunciated by such text writers as Sir William Macnaghten and Sir Thomas Strange. Their treatises have long been treated as of high authority by the Courts of India, and to overrule the propositions in question might disturb many titles"(3). Whether these observations touch the case of an imperative prohibition or not, they certainly have an application to the adoption which has been called in question in the present case.

We confirm the decrees of the Courts below, with costs.

Decree confirmed.

(1) I. L. R., 3 Bom., 273. (2) L. R., 5 I. A., 40.
(3) L. R., 5 I. A., 54.