APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

VYAS CHIMANLAL AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VYAS RAMCHANDRA (ORIGINAL PLAINTIFF), RESPONDENT.*

1899. *December* 21.

Hindu law—Adoption—Gift and acceptance—Ceremonies of adoption—Sapinda relationship, limitation of.

In the case of an adoption under the Hindu law, if there is evidence of gift and acceptance, and it is further shown that the adoptee has been recognised for a number of years and placed in possession of property, the Court may dispense with the formal proof of the performance of the ceremonies of adoption.

Where the natural mother of an adopted son was seven degrees removed from the common ancestor and the adoptive father five degrees removed *ex parte paterna*,

Held, that the adoption was valid.

Quœre—whether, when the relationship is more than six degrees removed, sapinda relationship between the natural mother and the adopter does not cease.

SECOND appeal from the decision of Ráo Bahádur Lalshankar Umiashankar, First Class Subordinate Judge, A. P., at Ahmedabad.

The parties to the suit were Audich Bráhmins by caste.

*Second Appeal, No. 694 of 1898.

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immediate effect to the injunction of any such warrant: Provided always, that in any case in which," &c.

"23. And it further ordered that it shall be lawful for Her Majesty's Consul to cause any British subject charged with the commission of any crime or offence, the cognizance whereof may at any time appertain to him, to be sent in any of Her Majesty's ships of war, or in any British vessel, to Her Majesty's territory of Bombay.

rbefore the High Court of the said territory: and it shall be lawful for the Commander".....[the section then provided for delivery to safe custody by the keeper of the common jail of such person, and continued:—] "and it shall be lawful for the keeper of the said common jail to cause such party to be.....produced upon the order of the said High Court, and the High Court at the sessions to be holden next after such committal shall proceed to hear and determine the charge against such party and to punish him for the same if found guilty, in the same manner as if the crime with which he may be charged had been committed within Her Majesty's said territory of Bombay."

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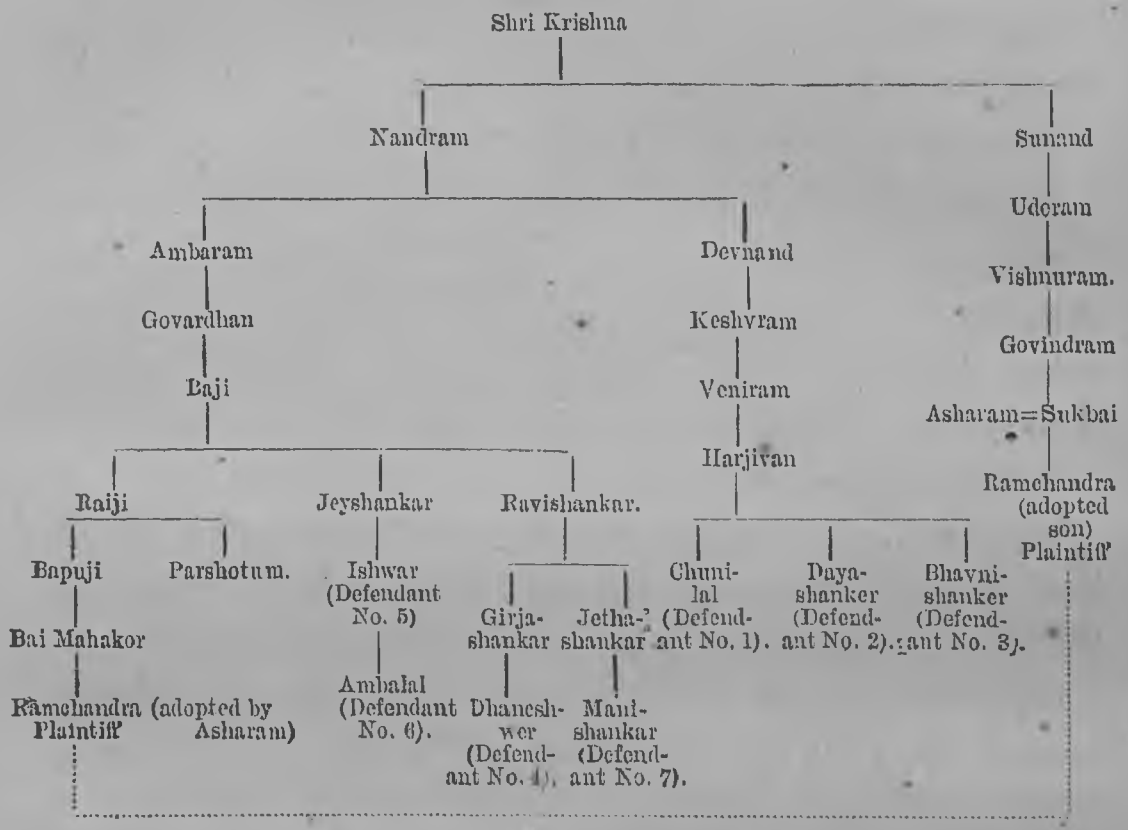
The relationship of the parties will appear from the following pedigree :—



All the branches of the family were divided in estate.

Asharam had a third share in the inám village of Mataria. He died leaving behind him a widow Sukbai, who in the year 1871 A.D. adopted the plaintiff. But the *datta hom* and other religious ceremonies connected with the adoption were not performed till 1881 A.D.

In 1882 A.D. a suit was brought to set aside plaintiff's adoption by Harjivan (father of defendants Nos. 1, 2 and 3), by Girjashankar (father of defendant No. 4), by Ishwar (father of defendant No. 6), and by Parshotum, as reversionary heirs of Asharam.

The Court of first instance held that Harjivan alone was entitled to sue as the nearest reversionary heir. It, therefore, ordered the names of the other plaintiffs to be struck off. On the merits it declared the adoption to be invalid.

On appeal the District Court reversed the decree of the original Court and dismissed the suit on the ground that Harjivan had

acquiesced in the adoption, and was, therefore, estopped from disputing it.

The District Judge, however, refrained from recording any finding as to the validity of the adoption.

This decision was upheld by the High Court in second appeal.

On 25th December, 1895, Sukbai, the widow of Asharam, died.

Thereupon Ramchandra, the adopted son of Asharam, was obstructed by defendants from receiving the income of the village Mataria, which was enjoyed by the different branches of the family by rotation.

This led to the present suit.

Plaintiff sought as the adopted son of Asharam to recover back from the defendants the produce of the village for the year 1896-97 A.D. which they had illegally taken.

Defendants pleaded (*inter alia*) that plaintiff was not the legally adopted son of the deceased Asharam, that they were the reversionary heirs of the deceased, and as such entitled to succeed to his property on his widow's death.

The Court of first instance held that the defendants were estopped from disputing plaintiff's adoption, and that the decision in the previous litigation operated as *res judicata*.

The Court, therefore, awarded the plaintiff's claim.

This decision was upheld on appeal.

Defendants thereupon preferred a second appeal to the High Court.

Ganpat Sadashiv Rao, for appellants :—Plaintiff's adoption is open to several objections. It is found as a fact that the natural father was not present at the adoption. The lower Court holds, however, that he had given his consent to the adoption, and that such consent was sufficient to validate the adoption. This is a mistake. Mere consent will not do. There must be a formal gift, manifested by an overt act. The natural father must hand over the child to the adoptive father or mother, and the latter must accept the child in adoption. In other words, an actual giving and taking is requisite to constitute a valid adoption; a constructive giving or taking will not do—*Srinarayan Mitter* v.

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Krishna Sundari (1); *Sohshinath Ghose* v. *Krishnasunderi Dasi*(2); *Ranganayakamma* v. *Alwar Setti*(3); *Govindayyar* v. *Dorasami*(4). There was no actual gift in adoption in the present case. The adoption is, therefore, bad *ab initio*.

The next objection is that the natural mother and the adoptive father were sagotra sapindas. The former was seven degrees removed from the common ancestor, while the latter was five degrees removed. They were, therefore, within the rule of prohibited connection, and no legal marriage was possible between the two. That being so, there could be no valid adoption, as there could be no valid marriage between the natural mother and the adoptive father—*Minakshi* v. *Ramanada*(5); West and Bühler's Digest, pp. 120, 121; Mayne's Hindu law, section 81; Bhattacharya, pp. 89 and 90.

Lastly, there is no evidence to show that the *datta homa* was performed on the occasion of the alleged adoption. As to the necessity of *datta homa* among Brahmins, see *Govindayyar* v. *Dorasami*(4).

Bhaishankar Nanabhai for respondent:—The appellants are estopped from disputing the adoption. They are bound by the decision in the former litigation between the same parties or those through whom they claim. All the objections that are now taken to the adoption were taken in the former suit, and decided in plaintiff's favour. But assuming that it is competent to the appellants to re-open these questions, the fact remains that the adopted son has been in uninterrupted possession of his adoptive father's property ever since the date of his adoption,—that is, for a period of nearly thirty years. His possession, *ex hypothesi*, was adverse to the reversioners, and the suit is barred by limitation. The adopted son was recognised by the whole family including some of the appellants; thirty years have elapsed since the adoption took place; after the lapse of so many years the law will presume that the essential ceremonies of adoption were duly performed, and that the adoption is a valid adoption. The

(1) (1869) 2 B. L. R., 279, A. C. J.
(2) (1880) 6 Cal., 381; 7 I. A., 250.
(3) (1889) 13 Mad., 214.
(4) (1887) 11 Mad., 5.
(5) (1887) 11 Mad., 49.

natural mother of the adopted boy was more than seven degrees removed from the common ancestor. She was, therefore, not a sapinda of the adoptive father. He could have legally married her. If so the adoption is valid—Mandlik's Hindu Law, pages 353 and 354.

As to the giving of the boy in adoption by his natural father, the finding of the lower Court is not very clear; but the evidence shows that the boy was actually given in adoption in 1871, though the ceremonies of adoption were not performed till 1881. The postponement of the ceremonies does not invalidate the adoption.

RANADE, J.:—The factum and validity of the adoption in this case were impeached by the appellant-defendants on five grounds: (1) that the respondent-plaintiff's natural father was not present in person at the time of adoption, and there was, therefore, no proper gift and acceptance; (2) that the adoptive father could not legally have married the natural mother of the respondent-plaintiff; (3) that the alleged custom of taking daughter's or sister's son in adoption was not proved; (4) that the respondent-plaintiff was the only son of his natural father at the time of the alleged adoption; and (5) that the consent of Harjivan, the father of appellants Nos. 1, 2 and 3, did not bind the other appellants, and could not validate the adoption, which was void *ab initio*. Of these five grounds mentioned in the memorandum of appeal, Mr. Rao, the appellants' pleader, chiefly relied on points 1 and 2, though he also referred to point 4, contending that the recent decision of the Privy Council did not affect the law in this Presidency. The other two points were not noticed by him, and they may, therefore, be passed over.

The first objection noted above assumes that the respondent-plaintiff's adoption took place in May, 1881, and not, as stated by the respondent, in Samvat 1927 (1871 A.D.). It is necessary in this connection to set forth briefly the history of the previous litigation between the parties. As far back as 1882, the deceased father of the present appellants Nos. 1, 2 and 3, the deceased father of appellant No. 4, the father of appellant No. 6, and one Parshotum, brought Suit No. 38 of 1882 against the present respondent-plaintiff

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and his adoptive mother to set aside the adoption, which was stated in that plaint to have taken place in 1881 without the consent of the plaintiffs in that case. The respondent-plaintiff was then a minor, but his mother stated that the adoption took place at the time of the thread ceremony which was performed in 1871 by Harjivan, the father of the first three appellants in this case, and that religious ceremonies were not performed at that time, but were celebrated in 1881. The Court of first instance found that the sacred thread ceremony was performed in Samvat 1927, as stated by the adoptive mother of the respondent, and at that time the natural father of the respondent was present. The Court further held that the adoption ceremony was not performed at that time, and when the adoption was performed in 1881, the respondent's natural father was not present, and the present appellants-plaintiffs in that case had not given their consent, and there was no proper gift and acceptance at that time. The Court finally decided that, excepting Harjivan, the other plaintiffs who had joined with him in the plaint had no right to bring the suit, as they were more distant relations. Their names were, therefore, struck off, and Harjivan's claim was allowed. The matter then went up in appeal, and the District Court, in Appeal No. 49 of 1883, reversed the decree of the first Court. It held (1) that the actual adoption took place when the thread ceremony was performed by Harjivan on behalf of the adoptive mother; (2) that at that time the natural father was present, and the giving and receiving were then completed; (3) that the adoption deed, which took place in 1881, was intended only to record the fact of the adoption, which had been already completed in Samvat 1927; and (4) that as Harjivan, the father of appellants Nos. 1, 2 and 3, had joined in the ceremony, he was estopped from questioning the adoption. The District Judge accordingly reversed the first Court's decree, and the High Court confirmed the decision of the District Judge (Exhibit 101). It was on the strength of these decisions that, when the present suit was brought by the respondent-plaintiff, both the Courts held that the adoption took place in Samvat 1927 (1871 A. D.), and not in May, 1881. Mr. Rao's contention, therefore, appears to be based on the position that the Courts below were in error in holding that the respond-

ent-plaintiff's adoption took place in 1881, and not, as found both in the previous litigation as also in the present case, in Samvat 1927, when the thread ceremony was performed. The authorities cited by him would be of use if, as a matter of fact, the adoption had taken place in 1881. On this point of fact, however, we see no reason to differ from the decisions of the Courts below. If there had been no adoption at the time of the thread ceremony, Harjivan would not have performed that ceremony which he admittedly did on that occasion. The plaintiff's natural father was proved to have been present at the time, and he would have performed the thread ceremony himself if there had been no adoption. The adoptive mother has all along been consistently maintaining that the adoption and the thread ceremony took place together. Her words in her deposition in 1883 (Exhibit 52) were "*janoi lidhu tyárthi dattaka lidhelo chhe.*" In her written statement (Exhibit 84) in the same case she was still more explicit, saying '*datta lai janoi didhelu,*' *i.e.*, after the adoption the thread was put on. The direct evidence of the priest (Exhibit 128) is to the same effect. The cases, therefore, cited by Mr. Rao have no application. The decision in *Sabo Bewa* v. *Nahagun Maiti*(1) is more in point. It decided that where there was evidence of gift and acceptance, and it was further shown that the adoptee was recognised for a number of years, and placed in possession of property, the Court may dispense with the formal proof of the performance of the ceremony. From the fact that the respondent plaintiff lived with the adoptive mother with the express consent of his natural father, and that the natural father allowed his thread ceremony to be performed by the relations of the adoptive mother, it is obvious that there was an overt act of gift and acceptance. The subsequent execution of the deed only recorded the fact of giving and accepting. The cases, therefore, where there was no gift and acceptance, but only deeds were passed, have no bearing on the present case—*Srinarayan Mitter* v. *Krishna Sundari*(2); *Siddessorry Dossee* v. *Doorgachurn Sett*(3). The giving and taking in this case would have satisfied the conditions laid down in *Shoshinath Ghose* v. *Krishnasunderi Dasi*(4). As regards other

(1) (1869) 2 Beng. L. R., App., 51.
(2) (1869) 2 Beng. L. R., 279.
(3) (1865) 2 Ind. Jur., p. 22.
(4) (1880) 6 Cal., 381.

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ceremonies, the performance of *hom* is not necessary even among Brâhmins in Southern India, if the adoptive father and the adopted son belong to the same gotra—*Singamma* v. *Ramanuja Charlu*[1]; *Govindayyar* v. *Dorasami*[2]; *Chandramala* v. *Muktamala*[3]. Among the Maráthas, the same principle was laid down in *Atma Ram* v. *Madho Rao*[4]. There was no compulsion or pollution in this case which vitiated the adoption in *Ranganayakamma* v. *Alwar Setti*[5]. The omission about the ceremonies was made good in 1881, and we, therefore, overrule this objection.

The second objection relates to the point that, as the natural mother of the respondent-plaintiff was one with whom marriage by the adoptive father was forbidden by reason of her being a sapinda, the adoption was not valid. The respondent-plaintiff's natural mother was Bai Mahakor, the daughter of one Bapuji. This Bapuji was sixth in descent from Shrikrishna, who was the common ancestor of Bapuji and Asharam, the adoptive father. The relation thus shown between Asharam and Mahakor was that Asharam was five degrees removed from the common ancestor, and Mahakor seven degrees removed. It is contended that marriage was prohibited to the parties by this relationship. In the original text of Shakal, on which this prohibition is sought to be based, the only near relations of this kind whose adoption is prohibited are the daughter's son, sister's son and the son of the mother's sister. The text of Shaunak, which is the only other authority on the point, mentions daughter's son and sister's son as permissible among Sudras, but not eligible among the higher castes. West and Bühler, page 886, notices, however, that among some of the higher castes, the daughter's son as also the sister's son are, under a special custom, deemed fit for adoption. The Sanskar Kaustubha and the Nirnaya Sindhu approve the adoption, failing a sagotra sapinda, of a daughter's or a sister's son. The Vyavahar Mayukha is no doubt opposed, and the decisions on our side follow the Mayukha in this respect as regards daughter's and sister's sons—*Gopal* v. *Hanmant*[6].

Ráo Sáheb Mandlik has construed the original texts differently, and argued that the rules of prohibition, both positive and

(1) (1868) 4 Mad. H. C. R., 165.
(2) (1887) 11 Mad., 5.
(3) (1882) 6 Mad., 20.
(4) (1884) 6 All., 276.
(5) (1889) 13 Mad., 214.
(6) (1879) 3 Bom., 273.

negative, expanded by Nandapandit, are only recommendations. In *Bai Nani* v. *Chunilal Jeshankar* (1), we have discussed the question of negative prohibitions at some length. The point is not of moment in the present case, where the relationship is more than six degrees removed, and it is doubtful whether sapinda relationship in such cases does not cease. The positive directions about the choice of adopted sons from near relations have been held by the Privy Council to be recommendatory only—*Wooma Daee* v. *Gokoolanund Dass* (2). The essential idea is that the boy should have the resemblance of a son, which really means that he should be of the same class and gotra, if possible, but just as more distant and even asagotra sons may be adopted, the son of Mahakor, who was the daughter of a distant cousin seven degrees removed, was not ineligible for adoption by the widow of Asharam. None of the cases decided have gone the length of prohibiting adoption, except as stated above, in the case of direct relations as daughter's and sister's sons, &c., among the higher castes. There is, therefore, no authority for extending the prohibition to the adoption in this case, more especially when the parties interested are shown to have taken part in the adoption or to have acquiesced in it. Harjivan admittedly took part, and the more distantly related plaintiffs did not appeal against their names being struck off in the suit of 1881. There is evidence to show that they took part in the caste dinners given by the respondent, and he was allowed to remain in possession all this time. It may, therefore, safely be held that they are estopped from raising the question at this stage—*Raja* v. *Subbaraya* (3); *Sadashiv* v. *Hari* (4). We, therefore, overrule the objection.

The third objection is disposed of by the decision of the Full Bench (5).

We, therefore, confirm the decree of the lower Court.

(1) (1897) 22 Bom., 973.
(2) (1878) 3 Cal., 587.
(3) (1883) 7 Mad., 253.
(4) (1874) 11 B. H. C. R., 190
(5) (1899) *ante*, p. 367.