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son that we ought not to hesitate—*Chotay Lall* v. *Chunno Lall*[1]. At present we are open to the reproach that our decisions are illogical and inconsistent. Mr. Mayne says that our mistaken view of a text of the Mitákshará is "at the root of a conflicting series of decisions" (sec. 565), and he naturally says (sec. 567) that if the mother and grandmother when inheriting from a son or grandson take an estate similar in all respects to that of a widow, the presumption is very strong that the passage should be interpreted in the case of other female heirs, so as to admit of a similar application.

For all these reasons I hold that when Amrat inherited her grandchild's property —whether it was (according to the old rendering of Mayukha IV, 10, 26) as if the grandchild had been a male, or whether the grandchild had been male or female—she inherited the full estate with power of disposing of it by will. This is the answer which in my opinion should be returned to the referring Bench.

Order accordingly.

(1) (1878) L. R. 6 I. A. 15 at p. 32; 4 Cal., 744.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

1899. *September* 12.

VALUBAI (ORIGINAL OPPONENT No. 1), APPELLANT, *v.* GOVIND KASHINATH (ORIGINAL PETITIONER), RESPONDENT.*

Hindu law—Adoption—Adoption of brother's son—Datta homa—Omission of datta homa ceremony—Adoption valid.

Among Brâhmans in the Presidency of Bombay the performance of the *datta homa* ceremony is not essential to the validity of the adoption of a brother's son.

APPEAL from the decision of M. P. Khareghat, District Judge of Ratnágiri.

The applicant, alleging that he was the adopted son of one Kashinath Abaji Joshi, prayed for a certificate to collect the debts due to Kashinath. The adoption was stated to have taken

* Appeal, No. 62 of 1899.

place on the 16th August, 1896, and Kashinath died on the 3rd November, 1896. The applicant further alleged that Kashinath had left a will in his favour. The parties were Bráhmans.

Kashinath's widow, Valubai (opponent No. 1), opposed the application and denied the adoption, and further alleged that even if a ceremony purporting to be an adoption had taken place it was defective and invalid, inasmuch as the *datta homa* ceremony did not form part of it. She also denied the alleged will.

The Judge granted the certificate, holding that Kashinath had made a will in applicant's favour; that the applicant had been adopted by Kashinath; that the adoption was not invalid by reason of the *datta homa* ceremony not having been performed; and that the performance of that ceremony was not necessary, as the applicant was a *sagotra*, being Kashinath's brother's son.

Valubai appealed.

Narayan V. Gokhale, for the appellant (opponent No. 1):—The alleged adoption was invalid, inasmuch as the *datta homa* ceremony was not performed. That is an essential part of the ceremony of adoption among Bráhmans. In Western India the Shástris have always insisted upon the performance of this ceremony. Amongst Bráhmans there may be retraction till the *datta homa* is celebrated, but not afterwards. Without it no spiritual benefit can be obtained from adoption—West and Bühler, pp. 1082-4, 1125-6. According to Steele's Hindu Law and Customs, pp. 46 and 184, its performance marks the completion of the ceremony of adoption—Bhattacharya's Hindu Law, p. 188; Sarkar on Adoption, pp. 379-80. In *Huebut Rao* v. *Govindrao*[1] the parties were not Bráhmans. The distinction drawn in that case with regard to the adoption of a nephew is not supported by the Dattaka Chandrika and the Dattaka Mimansa. A nephew's *gotra* is changed by his adoption, and, therefore, the *datta homa* is necessary. As to the meaning of the word "*gotra*" see Dattaka Mimansa, sec. II, pl. 4-7; Golapchunder Sarkar on Adoption, p. 382; Dattaka Mimansa, sec. V, pl. 45, 46, 55 and 56; and Dattaka Chandrika, sec. II, pl. 17; Vyavastha Darpana, pp. 871-2; Sarasvati Vilasa, verse 30. Yama's text on which the Allahabad High Court has relied in *Atma Ram* v. *Madho Rao*[2], as well as Ráo

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Sáheb Mandlik in his Hindu Law, p. 483, is to be found in no code now extant, and is, therefore, not binding—Mayne's Hindu Law, para. 140.

There is no decided case on the point so far as the Konkanastha Bráhmans are concerned. In *Ravji* v. *Lakshmibai*[1], Farran, J., was not prepared to hold that religious ceremonies were not necessary amongst Bráhmans in Western India. The cases decided by the other High Courts are not applicable to the Konkanastha Bráhmans.

Religious ceremonies are strictly insisted upon amongst the Konkanastha Bráhmans. We submit that inquiry should be made as to the custom relating to the performance of the *datta homa* among them—*Govindayyar* v. *Dorasami*[2].

Vasudev G. Bhandarkar, for the respondent (applicant) :—The Judge has considered the evidence in the case and has come to the conclusion that the ceremony of adoption did take place. What is essential for the validity of an adoption is the giving and receiving the boy. In this Presidency the Dattaka Chandrika and the Dattaka Mimansa do not possess the authority which they do in the other Presidencies. Here they are considered to be merely supplementary authorities on the subject—West and Bühler, pp. 10, 11. The performance of *datta homa* is not essential for the validity of an adoption—*Gopal* v. *Hanmant*[3]; Mandlik's Hindu Law, p. 509; Jolly on Adoption, pp. 159, 160; Strange's Hindu Law, Vol. I, pp. 95, 96. The effect of the performance of *datta homa* is to change the *gotra* of the adopted son. By the performance of the *homa* he exchanges the *gotra* of his natural father for that of his adoptive father. In the present case the *homa* was not necessary, because the adoptive father was the paternal uncle of the adopted son. The change of the *gotra* was not required—*Govindayyar* v. *Dorasami*[4]. It has been held that in the case of Shudras the performance of the *datta homa* ceremony is not necessary for the validity of an adoption. This shows that the ceremony is not necessary to constitute adoption. In Second Appeal No. 165 of 1865, the

(1) (1887) 11 Bom., 381.
(2) (1887) 11 Mad., 5, at pp. 9, 10.
(3) (1879) 3 Bom., 273, 277.
(4) (1887) 11 Mad., 5.

parties to which were Brâhmans, this Court (Newton and Warden, JJ.) held that the performance of the *homa* ceremony was not necessary to validate the adoption.

Even if the adoption be held invalid, we would be entitled to take the property under the will. The will operates as a deed of gift in our favour—*Nidhoomoni Debya* v. *Saroda Pershad Mookerjee*[1]; *Kullean Sing* v. *Kirpa Sing*[2].

Narayan V. Gokhale, in reply:—The will shows that the testator intended that the gift should take effect after the adoption was made. The *persona designata* is the adopted son and not the nephew—*Famindra Deb* v. *Rajeswar Das*[3]; *Abbu* v. *Kuppammal*[4]; *Shama Vahoo* v. *Dwarkadas*[5].

The authority of the Dattaka Chandrika and the Dattaka Mimansa cannot now be questioned in Western India: see *Waman Raghupati* v. *Krishnaji Kashiraj*[6].

JENKINS, C. J.:—The respondent in this case applied in the Court of the District Judge of Ratnágiri for a certificate to collect the debts of Kashinath Abaji Joshi. His application was based on the allegation that Kashinath had, on the 16th August, 1896, adopted him as his son and executed a testamentary document in his favour, and on the 3rd November, 1896, had died leaving property within the jurisdiction of the Court.

The application was opposed by the deceased's widow, Valubai, and by Shivram Bapuji Joshi, who maintained that the adoption did not take place, or was at any rate defective in a material particular; that the alleged testamentary disposition was not executed by the deceased, or if executed was not understood by him; and that in any case it would not operate in the applicant's favour if the adoption is not good. The District Judge has, notwithstanding these objections, granted the certificate sought, and it is from this decision the present appeal is preferred by Valubai alone.

The District Judge has found, as a fact, that on the 16th of August there was a ceremony of adoption; that there was a giving

(1) (1876) 3 Ind. App., 253; 26 Cal. W. R. 91.
(2) (1795) 1 Cal. S. D., 9.
(3) (1884-85) 12 I. App., 72; 11 Cal., 463.
(4) (1892) 16 Mad., 355.
(5) (1878) 12 Bom., 202.
(6) (1889) 14 Bom., 249, at p. 259.

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and taking of the applicant in adoption, but that the *datta homa* ceremony was not performed. He has further held that the testamentary disposition (Exhibit 49) was executed by the deceased, that he was at that time capable of disposing, and that he knew and understood what he was doing. There is ample oral evidence to support these conclusions, and notwithstanding the arguments urged against their correctness, such as the antecedent improbability arising out of the prior strained relations, the complete character of the previous dispositions, the failure to register, the omission of the ordinary rites, the inauspiciousness of the day and the other matters brought to our notice, we do not think we should be justified in refusing to accept the District Judge's finding of fact. The considerations urged before us must have been present to his mind, and he had the advantage, which we do not enjoy, of having heard and seen the witnesses who have deposed in this case. Agreeing, therefore, with the Judge's findings of fact, it is unnecessary that we should review the evidence, and we will confine ourselves to dealing with the points of law that have been urged before us.

It has been contended (i) that the omission of the *datta homa* ceremony is fatal, (ii) that even if that be not so generally, still it is so in this particular case, because there was an intention to perform that ceremony, and (iii) that the applicant cannot take as *persona designata* under the will, Exhibit 49. It has been argued before us that in the case of the three regenerate classes—and the parties here as Chitpávan Bráhmans would fall within that category—the *datta homa* ceremony is an indispensable rite. On the other side it is contended that, assuming there is a rule which prescribes the performance of that rite generally, still it is founded on a reason which makes it inapplicable where, as here, the adopted son is his adoptive father's brother's son. This contention it is sought to support on the authority of a text, of cases, and writers of long standing and acknowledged repute.

The leading text on the subject is one of Yama, which has been thus translated: "The homa or the like ceremony is not (necessary) in the case (of adoption) of the daughter's or the brother's son; by the verbal gift (and acceptance) alone that is accomplished: this is declared by the Lord Yama." In Babu Golapchundra

Sarkar's work on Hindu Law an interesting account of this text is given from which it will be seen that though in no code now extant can this text be found, still it has made its way into works on adoption. This text was quoted as long back as 1821 by some Bombay Shástris who were consulted in connection with the case of *Huebut Rao* v. *Govindrao*[1]. Though the names of the parties concerned in that suit would indicate that they were Mahráttas and not members of the three regenerate classes, still the decision went upon no such distinction, and the rule there enunciated was treated as being, at any rate in this Presidency, of universal application, and it was there considered that the adoption of a nephew would be valid even without a burnt sacrifice and would be complete by word of mouth alone. That case does not stand alone, for the same doctrine has been expressed and acted on in other cases. In an unreported decision of this Court, No. 165 of 1865, decided in August, 1865, the parties concerned being of the three regenerate classes, it was held by Newton and Warden, JJ., that the ceremony of *datta homa* was not essential to the legal validity of an adoption. Then in Madras it was held by a Full Bench in the case of *Govindayyar* v. *Dorasami* [2], that even among Bráhmans the *datta homa* ceremony was not necessary in the adoption of a brother's son, and the distinction arising out of identity of *gotra* enunciated in that case was further recognised in a later case of *Ranganayakamma* v. *Alwar Setti* [3]. The same view is held in the North-West Provinces, where there is a Full Bench decision that in the case of Dakhni Bráhmans the *datta homa* ceremony is not required to give validity to the adoption of a brother's son (*Atma Ram* v. *Madho Rao*[4]).

It was suggested before us, in argument, that there had been a similar decision in Bengal, and in support of this the case of *Kullean* v. *Kirpa* [5] was cited. That case, however, manifestly cannot be called in aid, for the adoption was in Tirhut and, therefore, would be in the Kritrima form where no religious ceremonies are required. But though this case cannot be properly relied

(1) (1821) 2 Borradaile, 83.
(2) (1887) 11 Mad., 5.
(3) (1889) 13 Mad., 214 at p. 219.
(4) (1884) 6 All., 276.
(5) (1795) 1 Cal S. D., 9.

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on, we find that the rule has not passed unrecognised in Bengal, for in the case of *Nittyanund Ghose* v. *Kishen Dyal Ghose* [1] Mr. Justice Bayley says: "In addition to this, we have the prominent fact in the present case, that the adopted son is a brother's son, a member of the same family, in regard to whom the mere giving and taking may be sufficient to give validity to the adoption."

As against these cases we have been referred to the decision of Farran, J., in *Ravji* v. *Lakshmibai* [2], where at page 395 he says that he would hesitate long before holding that an adoption is valid among Bráhmans, even in Western India, without the performance of the essential religious ceremonies. But to this expression of view it may be answered that the opinion, though entitled to great weight as proceeding from so eminent a Judge, was after all not a part of his decision, and that the special point with which we are now concerned was not before the Court. But, then, it is said that there is no true foundation for the principle on which these cases profess to be based, so that we will now shortly proceed to examine that principle. The case of *Huebut Rao* proceeds upon the text of Yama which we have already quoted, and if that text is to be taken as a governing rule, it places the matter beyond question. In *Atma Ram's* case, too, reliance was placed on Yama's text as applicable to Dakhni Bráhmans. So that it must be conceded that, though the text cannot now be traced, it has been regarded in two Presidencies as governing this question. The Full Bench of the Madras Court in *Govindayyar's* case in coming to the conclusion that, when the adoptive father and the adopted son are of the same *gotra*, the *datta homa* ceremony is not essential, did not rely on the text of Yama, but proceeded upon the opinion of Ellis as set forth in Vol. II, Strange's Hindu Law, at p. 104. By way of answer to this, Mr. Gokhale, adopting for this purpose an argument derived from Babu Golapchunder Sarkar's Book on Adoption at p. 382, has urged that the rule founded on the absence of any change of *gotra* is due to a misconception; for *gotra* in this connection means "state of lineage" and not "connection by the same general family;" and consequently in every adoption there must

(1) (1887) 15 Cal. W. R., 300. (2) (1887) 11 Bom., 381.

be a change of *gotra* and, therefore, a *datta homa* ceremony. In support of this reference is made to pl. 4—7 of the Dattaka Mimansa, sec. II. Placitum 4 cites a text of Vriddha Gautama, which is translated by Mr. Sutherland as follows :—"The sons given, purchased, and the rest, who are adopted from those of his own general family, by observance of form, acquire the state of lineage (*gotratá*) to the adopter," and it is this text which is the foundation of this argument. This same text is also to be found in the Mayuka, ch. IV, sec. V, pl. 33, where it is translated by Mr. Mandlik as follows :—"The sons given, purchased, and the rest whose ceremonies have been performed in the adopter's *gotra* enter the *gotra* by the observance of the ceremony." This rendering is perhaps hardly as favourable to the argument. Be that, however, as it may, we find that the text writers as well as the cases have not in this connection ascribed to the word "*gotra*" the meaning suggested by Mr. Gokhale's argument. They, in conformity with the cases to which we have referred, propound the view that the parties may stand to each other in such a relationship as that adoption affects no change of *gotra*, and that when this is so, the *datta homa* ceremony is not necessary. Thus at p. 89 of Strange's Hindu Law, Vol. II, it is said "ceremonial adoption cannot be necessary in the case of a Sudra, since by the *datta homam* the adopted son is converted from the stock (*gotram*) of the natural, to that of his adoptive father; and Sudras have no *gotra*." Then, again, in an account at p. 219 of the same volume of the ritual of *datta homa* from the Datta-Mimańsa of Savara Swami communicated by Mr. Ellis, after describing the ritual, it is stated "the above rite regards the adoption of a son from a different *gotram*;" and further on there is the following passage :—"It is farther observed by him that the author declares this ceremony to regard only the adoption of a son from a different *gotram*;—that though not improper, it is consequently not necessary when the adopted child is taken, as in the great majority of instances it is, from the adopted father's *gotram*."

Then, again, Mr. Sutherland, the translator of the Dattaka Mimansa and Dattaka Chandrika, in his Synopsis of the Hindu Law of Adoption seems to think that a nephew affiliated by an

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uncle may not come within the rule which prescribes the observance of religious rites. (Head Third, last paragraph.) While Mr. Steele in his book on the Law and Custom of Hindu Castes within the Dekkhan Provinces writes that it is said the *homa* ceremony is unnecessary in the adoption of a brother's son which is performed by *wakyadan* or verbal gift; and in support of this he refers to 2 Borrodaile, 85, and, on the authority of Bhalchundra Shastri, he says the same rule holds in the case of an elder brother. Later on he says: "On account of the previous enquiry, few cases can occur of the discovery subsequent to adoption that the boy has not been adopted in the prescribed order, or that his age exceeds the limit, or that he was an only son, or that the consent of the prescribed persons has not been obtained; should such a discovery be made, the adoption cannot be annulled after the above ceremonies have been performed, and they are not essential where the adoptee is of the same *gotra*. But in case of discovery that the boy, being of another *gotra*, was not adopted with those ceremonies, or that he was of another caste, the adoption is null."

These are all writers of considerable authority, and now of some antiquity, so that in face of their opinions and of the decided cases and the text of Yama, to which we have referred, it would not be right for us at this date to impose upon the adoption, in this province, of a brother's son as an essential condition of its validity the performance of the *datta homa* ceremony, even though the parties be members of one of the three regenerate classes. This is eminently a case in which the principle *stare decisis* should be applied, and if we were now to accede to the proposition for which the appellant contends, it might, for aught we know, disturb a large number of titles to property. In our opinion, therefore, we must hold that in the adoption of a brother's son the *datta homa* ceremony is not essential in this province.

This brings us to the point whether the adoption was bad in consequence of the failure to perform an intended ceremony. In support of this contention we have been referrred to section 144 of Mr. Mayne's Book and the authorities he there names. It appears to us that this is not so much a rule of law as an inference of fact, and all that it comes to is, that the omission of a rite may,

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under certain circumstances, induce the inference of an intention that the adoption should, until the subsequent performance of that rite, remain incomplete. If, however, the omission is to be attributed to a determination to abandon that part of the adoption without any intention of performing it at some subsequent time, then there would be nothing in it to make the omission of the ceremony, if unessential, fatal to the adoption, for it evidences no intention inconsistent with a determination that the adoption should be regarded as final and complete. In our opinion, on the facts of this case, the omission does not lead to the inference that there was an intention to leave anything unfinished with a view to its completion on a later day, and we see nothing in it that would invalidate the adoption.

Having arrived at these conclusions, from which it follows that there was a good adoption, it is unnecessary to consider whether the respondent could have claimed under Exhibit 49 as *persona designata*, for he clearly takes, if, as we hold, the adoption was good. The result is that the appeal must be dismissed and the decree of the lower Court affirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

DOSHI TALAKSHI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHAH UJAMSI VELSI (ORIGINAL DEFENDANTS), RESPONDENTS.*

1899. *September* 18.

Wager—Wagering contracts—Sattá transactions—Suit to recover brokerage in respect of sattá transactions—Bombay Act III of 1865— *Contract Act* (*IX of* 1872), *Sec.* 30.

Plaintiff was employed by defendants to enter into cotton transactions on their behalf at Dholera. The contracts for the sale and purchase of cotton were made on terms contained in a printed form which incorporated the rules framed by the cotton merchants of Dholera. These rules expressly provided for the delivery of cotton in every case and forbade all gambling in differences. In spite of these rules, and the express terms of the contracts, the course of dealings was such that none of the contracts were ever completed except by payment of

* Cross-appeals, Nos. 77 and 78 of 1899.