
(1916) 05 CAL CK 0024
In the Calcutta High Court

Asita Mohan Ghose Moulik

APPELLANT

Vs

Nerode Mohan Ghose Moulik
 Nerode Mohan Ghose
Moulik Vs Asita Mohan Ghose Moulik

RESPONDENT

Date of Decision : 08-05-1916

Acts Referred:

Citation : 35 Ind. Cas. 127

Hon'ble Judges : Newbould, J;Chaudhuri, J

Bench : Division Bench

Judgement

1. One Radha Mohan Ghose Moulik, a Bengali Kayastha zemindar of the District of Murshidabad governed by the Dayabhaga School of Hindu Law, died intestate on the 16th Vadro 1300 = 2nd September 1903. In the Collectorate Register he was recorded as the proprietor of certain zemindari properties and as shebait of certain debutter properties. Shortly after his death Sailendra Mohan Ghose Moulik applied for registration of his name under the Land Registration Act in respect of 8 annas of both the zemindari and debutter properties, alleging that he had been adopted by Radha Mohan as his son on the 26th Joistha 1283--7th June 1876 and that Asita Mohan Ghose Moulik, who was born on the 29th May 1289 as the afterborn natural son of Radha Mohan Ghose Moulik, was entitled to the other 8 annas. Asita Mohan objected to Sailendra's application denying his adoption and applied for registration of his name in respect of the entire 16 annas as the only son and heir of Radha Mohan. The Land Registration Officers held that Sailendra was the adopted son of Radha Mohan and registered his name in respect of 8 annas of the zemindari properties only and Asita's name in respect of other 8 annas and as shebait of the entire debutter properties. Sailendra died on the 22nd Aswin 1312 = 8th October 1905, leaving Nirode Mohan and Khirode Mohan, his sons. They instituted Suit No. 79 of 1909 in the Birbhum Court for a declaration that they were entitled aa shebaits by descent from their father to 8 annas of such properties as were debutter. They asserted that the properties set out in Schedules Kha and Ga to their plaint were not debutter, and prayed for declaration that they were entitled to one-half of these

properties as proprietors, but submitted in the alternative that if the Court found that those properties were charged with deva sheba expenses, they should be declared entitled thereto and to possession thereof as proprietors, subject to such charge, or if the Court found them to be absolute debutter, they submitted that they were entitled thereto as co-shebait, to the extent of 8 annas.

2. Asita Mohan, on the other hand, instituted Suit No. 134 of 1909 in the same Court for declaration of title to and possession of the whole of mat or zemindari properties as the sole heir of Radha Mohan and claimed that Kismat Binderpore (Tauzi No. 9552) recorded by the Land Registration Officers as mal property was really the debutter property of Radha Gobind Jiu. Both these suits were tried together (see Order No. 18, dated 31st January 1910, in Suit No. 79 of 1909 and Order No. 8 of same date in Suit No. 134 of 1909) and one judgment has been delivered in both.

3. The learned Subordinate Judge has held

(i) as to adoption:

(1) That Radha Mohan's family is a family of Bengal Kayasthas, who are Sudras, amongst whom the ceremony of "giving and taking" only is necessary for the validity of an adoption.

(2) That Sailendra Mohan was given by his natural father, Kumar Narendra Chandra Roy, to Radha Mohan Ghose Moulik, who took the boy in adoption on the 26th Joistha 1283 = 7th June 1876 and that the adoption was not contrary to law or custom in any respect.

That an ekrar-patra (Exhibit 13) was executed by Radha Mohan addressed to Kumar Narendra Chandra Roy, the natural father of Sailendra Mohan, and a deed of gift (Exhibit 64) was executed by Kumar Narendra Chandra Roy in favour of Radha Mohan at the time of the said adoption and that both the documents are genuine, valid and operative.

(3) That being Sudras, Sailendra as the adopted son of Radha Mohan was entitled to share equally with Asita Mohan, the after born natural son, and that he was also so entitled according to the terms of the ekrar-patra (Exhibit 13).

(ii) As to the debutter properties:

(1) That Kismat Binderpore mentioned in Suit No. 134 of 1909 was not debutter nor was it ever treated as debutter.

(2) That as to the properties in Schedules Kha and Ga annexed to the plaint in Suit No. 79 of 1909, Harishchandrapur, Taraf Mandar (appertaining to Huda Kutubpur and Fatehpur) were not debutter, but all the others were absolute debutter and not merely charged with deva sheba expenses.

(iii) That Sailendra Mohan had no right to be a shebait in respect of the deva sheba or the debutter properties in the presence of the natural born son Asita

Mohan, and, therefore, Sailendra's sons had no such right.

4. He has thus decreed that the sons of Saileridra are entitled to one-half of all the secular properties including Binderpore, Harishchandrapur, Taraf Mandar (appertaining to Huda Kutubpur and Fatehpur).

5. It appears that Sailendra's son³ have effected mortgages and granted putni leases in favour of defendants Nos. 3 to 6 in Suit No. 134 of 1909. The learned Subordinate Judge has held that they are not binding on Asita Mohan.

6. Asita Mohan and the sons of Sailendra have filed separate appeals against such portions of the judgment and decree as are adverse to their respective contentions. Defendants Nos. 3 to 6 have not appealed. Asita Mohan's appeal, being the earlier one in order of date, came up first, but both appeals have been heard together at the request of the parties.

7. We intend to deal with the findings of the Subordinate Judge in the order above set out.

(i) As to the adoption:

(1) We agree with the learned Subordinate Judge that Kayasthas according to the law prevalent in Bengal are considered as Sudras. The question has frequently arisen in connection with cases of adoption and it is settled that as Sudras, no religious ceremony is in their case necessary, but that the mere giving and taking of a son is sufficient to give validity to adoption amongst them. See *Raj Coomar Lall v. Bissessur Dayal* 10 C. 68 694. As to Bengali Kayasthas being Sudras see the passage from Shayam Charan Sirkar's *Vyavastha Darpana* quoted in *Raj Coomar Lall v. Bissessur Dyal* 10 C. 68 . They have been treated as Sudras in our Court for a long series of years and their status as such cannot now be questioned. Asita Mohan did not submit anything to the contrary in his plaint or written statement. No issue was raised as to whether Kayasthas are Sudras or not, when issues were settled in the Trial Court. It appears, however, that during the examination of Banwari Lal Ghose, Asita Mohan's witness (No. 22), questions were sought to be put to him about some Kayasthas recently taking the sacred thread, which the learned Subordinate Judge disallowed. See Order No. 110 of the 2nd February 1912 in Suit No. 79 of 1909. We think that the learned Subordinate Judge rightly disallowed such questions. During the argument before us nothing was urged by Asita Mohan's learned Vakil on this point, but the concluding sentence of the learned junior Vakil's address in reply was, that his clients having raised the point although they as his Vakils had not argued it, it was not to be considered that the point was abandoned. We do not think the question ought now to be allowed to be raised. Bengali Kayasthas have been uniformly treated as Sudras in our Courts and the question does not appear capable of serious argument, although attempts may have recently been made by some members of the community to trace their descent from Kshatriyas, and some of them may have actually taken the sacred thread as belonging to the regenerate classes.

8. As to the factum of adoption:

Sailendra Mohan was the second son of Kumar Narendra Chandra Roy of Sheoraphuli, the brother of Nagendra Bala, wife of Radha Mohan and mother of Asita Mohan. Narendra has been examined. He deposed to giving the boy in adoption to Rada Mohan on the 26th Joistha 1283 = 7th June 1876. On that very day the ekrar-patra (Exhibit 13) and deed of gift (Exhibit 64) were executed and registered and exchanged by and between the natural father and the adopter. The child was then seven or eight months old. Narendra made over the child at his own house at Sheoraphuli to Radha Mohan, who took him as his adopted son in the presence of a large number of people who had been invited to witness the ceremony. Within a month thereafter the boy was removed to Radha Mohan's house at Panchthopi, where the namkaran and annaprasan ceremonies of the boy and the putresthi jag were performed. At these subsequent ceremonies Narendra, the natural father, was not present. The boy was named Sailendra Mohan Ghose Moulik--Ghose Moulik buing the caste name of Radha Mohan, and was brought up in Radha's family as his adopted son. Sailendra and Asita Mohan, who was subsequently born, were taken by Radha Mohan himself on the same date (3rd August 1891) to the sams school, the Metropolitan Institution in Calcutta, and admitted there as students. All the members of the family of Radha Mohan, their relations and agnates, amlas, servants, tenants and others connected with them treated Sailendra as the adopted son up to his death. He was married at Radha Mohan's expense to the daughter of Raja Khetra Mohan Singh, member of a very respectable Kayastha family of Dinajpur, in 1298. He was known as the Boro Babu (eldest son) and Asita Mohan as the Chota Babu, the younger son. In the family account books their expenses are so headed. Sailendra called Radha Mohan "father" and Nagendra Bala "mother" and his natural father Narendra as "mama" (maternal uncle in his relationship as the brother of Nagendra Bala). Asita used to address Sailendra as "dada" (eldest brother). After Radha Mohan's death, which took place in Vadro 1310, invitation letters for the shrad, Exhibits 16 (1) and 16 (2), were issued in the name of Sailendra and this was done by Asita Mohan. At the shrad, gifts were dedicated by Sailendra. In fact the evidence that Sailendra was known as and treated and enjoyed the status of a son during Radha Mohan's lifetime and also right up to Sailendra's death is so overwhelming that both in the Trial Court and before us, the facts proved by his sons about such treatment were not seriously challenged. Learned Vakil for Asita Mohan conceded that these facts undoubtedly raised a very strong presumption that Sailendra had been duly adopted. He went further and said that if no direct evidence of the giving and taking had been given, the Court would have been justified upon that presumption in upholding the validity of the adoption but he argued that inasmuch as some direct evidence was given, the question whether giving and taking of the child actually took place or not must rest upon that evidence and not upon any presumption. If that evidence is unsatisfactory the presumption raised by conduct, he argued, would be of no avail. He criticised the evidence of Kumar Narendra Chandra Roy and Jogendra

Chandra Ghosh who deposed to the "giving and taking" as discrepant. Narendra could not exactly recall if Jogendra was at the particular spot at the time of adoption, but "he was at Sheoraphuli participating in the matter of adoption." Jogendra said he was actually present at the time. According to Narendra the baby was brought in the arms of a maid servant to the baitakkhana (the outer apartments) and made over to him and he from his arms made over "the baby to Radha Mohan Babu's arms", who took it in his lap and went "inside," meaning the inner apartments, and he followed. That was the giving and taking." Asked if anything was said on that occasion the witness answered: "I said I make over the baby to you at the free will and consent of myself and my wife (and he accepted it and said I have already taken the child, you bless him and he went inside)": the portion within brackets the witness is said to have volunteered. It is so noted in the deposition.

9. Jogendra's version is-"From the inner apartments a maid servant brought the child. Kumar Narendra Chandra took the child from her and made over the child to Radha Mohan."

Q.--What did Narendra Chandra say when he made over the child?

A.--Narendra said, "You have been requesting me for the child for a year. You may take him now."

Q.--What did he want the child for V A.--He wanted the child for dattak grahan adoption). Radha Mohan took the child in his arms and went to the inner apartments and Narendra also followed him. I have narrated the conversation as I heard it.

10. There is no discrepancy between. these two versions of any value. It must be remembered that the witnesses were speaking in 1912 of what happened in 1876, 36 years ago. That Narendra failed to remember that Jogendra was present at the spot, indicates that they had not been comparing notes. Most of the other persons said to have been present on that occasion are dead. One Lalit Mohan Ghose is still alive, but it is in evidence that he was ill and bedridden when the case was being heard. As against the above evidence we have that of Nogendra Bala, the mother of Asita Mohan. Her denial is of no value. In fact she has so palpably told untruths even in respect of matters not seriously contested by Asita Mohan that the Trial Court was quite right in disregarding it. We are unable to attach any weight to her evidence. It was at first argued that the recitals in the ekrar-patra and deed of gift showed that no giving and taking had taken place on the 26th Joistha 12S3, but later on the learned Vakil modified his argument by saying that although the ekrar-patra (Exhibit 13) might be read as supporting the statement that the giving and taking had taken place, the deed of gift was so worded as to show the contrary, that is to say, it showed that the giving and taking was to take place on a future date.

11. Now Exhibit 13 is quite clear. It contains the following recitals:

You (Narendra) have of your own free will made a gift of your second son to me and executed a deed of gift. I (Radha Mohan) also of my own free will and in good faith adopt the aforesaid according to the Shastras.

12. This passage leaves no room for ambiguity. The argument was, however, based upon the opening sentence of the document which reads thus in the translation put before the Court, viz.--"Being without any issue I (Radha Mohan) intend to adopt a son," which was construed to mean that he had not yet adopted the boy, but only intended doing so. The passage has, however, been mistranslated. The words used are "ami grahanechchook hawaya", which main "I having desired to take a son." This translation was accepted as correct by the learned Vakil and he withdrew his argument so far as the ekrar was concerned.

13. The argument as to the deed of gift (Exhibit 64) executed by Narendra is based on the following passage:

By adopting him a# a son according to the rites prescribed by the Shastras, by performing the namkaran and other ceremonies, by bringing him up as your son, by performing all the ceremonies at different stages of life, by making him a successor to your properties, etc., etc., you (Radha Mohan) shall live in the enjoyment of perfect felicity.

14. It is argued that this passage shows that the rites were to be performed later and that inasmuch as the namkaran as a matter of fact did take place later at Panchthopi, it was intended that everything in connection with the adoption was to take place later. This is plausible, but overlooks two passages in the earlier part of the document, namely:

(a) "Accordingly, I give you my younger son for adoption by divesting myself of all rights in him." This is the translation in the paper-book, but the passage correctly translated should read thus--"I am giving you my younger son in adoption by divesting myself, etc." That this is the correct translation is accepted by the appellant's Vakil. The Bengali words used in the document are "amar kanistha putrati apanake nisshatwa haiya dattak dan karitechi.

(b) You have also on agreeing to the same and on accepting the gift executed an ekrar, I also execute this Deed of Gift and declare as follows: Whatever rights I had in the aforesaid son have from this day vested in you.

15. If the giving and taking had not taken place on that day, how otherwise had the right to the son vested in Radha Mohan from that day? That is the essential element in an adoption between Sudras. No doubt the putresthi jag and namkaran took place afterwards, but they are not essential ceremonies. It is also significant that Narendra was not present at Panchthopi where these ceremonies took place afterwards. If the "giving and taking" was to have taken place later at Panchthopi, why did not Narendra go there? The only explanation is that the formal giving and taking had taken place before at Sheoraphuli.

16. The Bengali passage "apani jatha shastranushare dattak dan grahan kariya"

has been translated as by adopting him according to the rites prescribed "by the Shastras." The verbal form "kariya" in Bengali may be rendered either as by adopting him," or having adopted him." We are unable to draw the conclusion suggested by the learned Vakil having regard to the two passages from the same document above given. We must not also forget that Exhibit 13 and Exhibit 64 are contemporaneous documents.

17. It is quite true that at the time of the adoption Radha Mohan and his wife were not old and that the lady was not past child-bearing age, but they had been married many years and were without a child. Adoptions had before this taken place in the family. In fact both Radha Mohan and his father were adopted sons. There is nothing unnatural in Radha Mohan thinking of taking a son in adoption at that time. In fact there is evidence, which we see no reason to disbelieve, that his wife was anxious that he should adopt the second son of her own brother and thus prevent him from taking a second wife. She appears to have proposed this adoption through amongst others an English governess in her brother's family.

18. To account for Narendra swearing that he had given Sailendra in adoption to Radha Mohan, it has been suggested that Narendra was in very poor circumstances and was anxious to thrust the child on his brother-in-law, as too heavy a burden upon himself. Narendra was not, however, in straitened circumstances at that time. We do not see any reason why he should be disbelieved, because he has since suffered from misfortunes and has lost his properties. He belongs to a Kayastha family of rank which at that time enjoyed a high status. We see no reason to doubt his evidence and are of opinion that the giving and taking took place as deposed to by him and Jogendra.

19. It has also been suggested that the adoption was unlikely as on that date Radha Mohan was in asouch, owing to a birth in the family of one Mohendra Narain, an agnate of his. The Subordinate Judge is right in holding that it is not proved that any message about such Birth reached Radha Mohan on that date. Such asouch results from knowledge of the fact. It is not shown that Radha Mohan knew of such birth at that time. Besides, it has been held that pollution on account of the birth of a relative does not vitiate an adoption. It is only a bar to religious acts and renders religious ceremonies inefficacious, but gift and acceptance are secular acts. See *Santappayya v. Rangappayya* 18 M. 397 : 5 M.L.J. 66.

20. It is argued that it is unlikely that the "giving and taking" took place in the baithakkhana in Narendra's house, when he had a thakurhari, but it is not a religious ceremony and only a secular act.

21. We have now dealt with all the points raised before us in connection with the adoption and hold that Sailendra Mohan was validly adopted.

22. We shall now deal with the decision of the learned Subordinate Judge that being Sudras, Sailendra the adopted son was entitled to share equally with Asita Mohan the afterborn natural son, and that he was so entitled also according to

the terms of ekrar-patra (Exhibit 13).

23. There has been considerable divergence of opinion between the different High Courts in India relating to the shares of an adopted son and an afterborn natural son amongst the three regenerate classes, but this is a case of Sudras, which has not been the subject of much judicial discussion.

24. Mayne thus deals with it in the second portion of Section 168 H L, 224(8th Edition):

According to a text of Vriddha Gautama, an adopted and an afterborn son share equally. This text is said in the Dattaka Chandrika to apply only to Sudras, and in the Dattaka Mimansa it is explained away altogether as referring to an afterborn son destitute of good qualities. The High Court of Madras, following Mr. W. MacNaghten and Sir Thomas Strange, say it is in force among all Sudras in Southern India, and M. Gibelin says it is the rule among all classes in Pondichery. It is the rule still in Northern Ceylon. Babu Shamachurn says that in Bengal this rule only applies to the lower class of Sudras.

25. Clear authority for the proposition that they share equally is to be found in the Dattaka Ohandrika. See V, Sections 29 to 32.

26. The Dattaka Chandrika is a work of undoubted authority in Bengal. It is a special treatise on the subject of adoption and "possesses at present", in the words of Mayne, "an authority over other works on the same Subject." See Section 30, Hindu Law, page 30 (8th Edition).

27. MacNaghten (W.H.) says--"in questions relative to the law of adoption the doctrine of the Dattaka Ohandrika is adhered to in Bengal."

28. In Rungama v. Atchama 4 M.I.A. 1 : 7 W.R. 57 (P.C.) : 1 Suth. P.C.J. 197 : 1 Sar. P.C.J. 313 : 18 E.R. 600 their Lordships in the Privy Council said, on page 97 referring to the Dattaka Ohandrika and the Dattaka Mimansa, as follows: "We think that these treatises are more distinct than the work of Jagannatha; they are written on the parti ular subject of adoption; they enjoy, as we understand, the highest reputation throughout India."

29. In Collector of Madura v. Moottoo Ramalinga Saihupathy 12 M.I.A. 397 : 17 (P.C.) : 1 B.L.R. 1 (P.C.) : 2 Suth. P.C.J. 135 : 2 Sar. P.C.J 361 : 20 E.R. 389 their Lordships on page 4 37 said: "Of the Dattaka Mimansa and Dattaka Ohandrika the two treatises on the particular subject of adoption, Sir William MacNaghten says, that they are respected all over India: but that when they differ the doctrine of the latter is adhered to in Bengal."

30. In Woman Raghupati Bova v. Krishnaji Kasiraj Bova 14 B. 249 a Full Bench of the Court said on page 259-"The Dattaka Mfmansa and Dattaka Chandrika are regarded in this Court as the leading authority on the subject of adoption and although their title to such high authority has been disputed and such course may be fairly open to a critic of the decisions of the Court, the Court should, in

the absence of a very cogent reason to the contrary, not depart from the standard it has uniformly applied in appreciating the value of the different text book writers."

31. In *Sri Balusu Gurulingaswami v. Sri Balusu Bamalahshamma* 26 I.A. 113 : 21 A. 460 : 22 M. 398 : 3 C.W.N. 427 : 1 Bom. L.R. 226 : 9 M.L.J. 67 : 7 Sar. P.C.J. 330 Lord Hobhouse in delivering the judgment of the Board said on page 131 pages of 26 I.A.--Ed.: "The date of the Dattaka Chandiika is not certain, but it is at all events very much later than the Smritis." After dealing with the observations of West and Buhler in their *Hindu Law*, 3rd Edition, page 11, his Lordship says on page 132 pages of 26 I.A.--Ed.: Both works have had a high place in the estimation of Hindu Lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Knox, J., in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But so far as saying that caution is required in accepting their glosses when they deviate from or add to the Smritis, their Lordships are prepared to soncur with the learned Judge."

32. In *Bhagwan Singh v. Bhagwan Singh* 26. I.A. 153 : 21 A. 412 : 3 C.W.N. 454 : 1 Bom. L.R. 311 : 7 Sar. P.C.J. 474 their Lordships on page 161 pages of 26 I.A.--Ed. Say--"Their authority (Dattaka Mimansa and Dattaka Ghandrika"s) has been affirmed as part of the general Hindu Law, founded on the Smritis as the source from whence all Schools of Hindu Law derive their precepts." They sum up by saying that "both works must be accepted as bearing high authority for so long a time that they have become embodied in the general law." Their Lordships in the Privy Council in the very recent case of *Nagindas Bhugwandas v. Bachoo Hurkissondas* 32 Ind. Cas. 403 : 23 C.L.J. 395 : 20 C.W.N. 702 : 30 M.L.J. 19 : 14 A.L.J. 185 : 3 L.W. 259 : 19 M.L.T. 193 : 18 Bom. L.R. 172 : (1916) 1 M.W.N. 258 : 40 B. 270 have referred to the Dattaka Ohandrika as a work of authority and held that the position of the adopted son is accurately defined in the Dattaka Chandrika and Dattaka Mimansa.

33. Having regard to these series of decisions the Dattaka Chandrika must be considered as a work of great authority.

34. Strange in his *Hindu Law*, page 99 (Edition 1830), states: "Amongst the Sudras the afterborn son and the adopted share equally the parental estate" : but no authority is cited in support. Apparently the basis upon which it is based is the Dattaka Chandrika.

35. Although the high authority of the Dattaka Chandrika has been accepted by the Privy Council in a series of cases, some recent text-writers, among them Golap Chandra Shastri in his *Hindu Law* (4th Edition), have tried to question the

authority of the Dattaka Chandrika, the work being said to be a literary forgery and "according to rumour" written in support of an adoption case which was then pending in the Calcutta High Court. The author speaks of the rule relating to Sudras as being a novel one enunciated for the first time in the Dattaka Chandrika.

36. From this and the observations of the Privy Council in the case of Sri Balusu Qurulingaswami v. Sri Balusu Ramalakshammamma 26 I.A. 113 : 21 A. 460 : 22 M. 398 : 3 C.W.N. 427 : 1 Bom. L.R. 226 : 9 M.L.J. 67 : 7 Sar. P.C.J. 330 that caution is required in accepting its glosses where it deviates from or adds to the Smritis, it has been submitted that no weight ought to be attached to the passages in the Dattaka Chandrika above referred to, inasmuch as, it is contended that the learned author has, in laying down the above rule, deviated from the Smritis or added to them.

37. Before examining this contention, we should point out that the rule as laid down in the Dattaka Chandrika relating to the shares of the Sudra's adopted son and the afterborn natural son that they share equally, was accepted without question by the Madras High Court in Raja v. Subbaraya 7 M. 253 one of the Judges in that case being Mr. Justice Muthusami Ayyar, who was a great Hindu lawyer. The correctness of that decision has never been questioned. It has been quoted by the Privy Council in the case of Nagindas Bhugwandas v. Bachoo Hurkissondas 32 Ind. Cas. 403 : 23 C.L.J. 395 : 20 C.W.N. 702 : 30 M.L.J. 19 : 14 A.L.J. 185 : 3 L.W. 259 : 19 M.L.T. 193 : 18 Bom. L.R. 172 : (1916) 1 M.W.N. 258 : 40 B. 270 above cited without disapprobation.

38. In Baramanund Mahanti v. Krishna Charan Patnaik 12 Ind. Cas. 6 : 14 C.L.J. : 183 a Bench of this Court accepted the law as laid down in the Dattaka Chandrika on this point. Their Lordships said: "It is, however, unnecessary to decide this point in the present case, namely, as to whether the adopted son took the father's full share as the families are Sudras and by paragraph 29 of the Dattaka Chandrika, Section V of the preceding paragraph 25 does not apply to families of that caste."

39. There are no other decided cases exactly on the point. We feel bound to attach great weight to the fact that these decisions have remained unchallenged for over thirty years.

40. It has been pointed out to us that in the Dattaka Mimansa, v. 40 to 44, Vyavastha Darpana, 1042 to 1046, Vyavastha Chandrika (Edition 1880), Volume 2, page 1G9, Dayacrama Sangraha, Chapter VII, Clause 23, Dayatattwa by Raghunandan, Chapter II, Volume 37, Dayabhaga, Chapter X, Section 9, V. 13, Vyavahara Mayukha, Mandalik's Edition, page 60, and Mitakshara, Chapter I, Section XII, V. 24 to 25, no special rule as to Sudras has been laid down.

41. In order to examine the contention that the rule laid down in the Dattaka Chandrika has added to or deviated from the Smritis, it is necessary to quote the following passages from the work which give the authorities in support of the

rule:

V. Section 29.-"The mode, however, of partition between the son of the wife, the son given and the rest and the legitimate son which has been propounded in what proceeded does not apply to the Sudra class."

V. Section 30.--Since in the following texts of Manu and Yajnavalkya, respectively, a share equally to that of the real legitimate son is prescribed for the son even by the female slave of a man of the class in question and the heirship with the daughter's son of such son only when having no brother is intimated; the equal partition of the son of the wife, the son given and the rest with the real legitimate son whilst the father lives and their succession to the moiety of the share of such son, where the father may be dead at the time of partition, follow a fortiori. And otherwise there would be a great inconsistency, if where the son of the wife, the son given, and the rest took the fourth of the share of the legitimate son, the son by a female slave, whose title is infinitely inferior in respect to these, were to take an equal share with the legitimate son. Manu-"But a son begotten by a man of the servile class on his female slave or on the female slave of his male slave may, by permission, take a share of the heritage. This is the law established." Yajnavalkya: "Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead, the brothers should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property in default of daughter's sons.""

V. Section 31.--"if, according to this authority, where there may be no son of the wife and the rest, but there may be a wife and daughters, the daughter's son be entitled to share (with the son by a female slave): the rule for the succession of the daughter (or other proper heir) would be infringed; therefore, if any even in the series of heirs down to the daughter's son exist, the son by a female slave does not take the whole estate; but only shares equally with such heirs."

V. Section 32.-"Accordingly the text subjoined must be construed as referring merely to Sudras, A son given being thus adopted, if by any chance a legitimate should be born, let them be equal partakers of the father's estate." So also in the following text the equal participation of all lawfully begotten Sudras having been first propounded, the succession to equal shares, of the other sons likewise, is subsequently declared by the sentence, ("If there be an hundred sons") occurring therein, "For a Sudra is ordained a wife of his own class and no other. Those begotten on her shall have equal share; if there be an hundred sons (the same mode of partition shall obtain)." If the sentence in question, be referred to the real legitimate son only, the position contained in it being obtained from what preceded, its repetition would be unmeaning."

42. The Dattaka Chandrika cites Manu and Yajnavalkya as authority for the proposition laid down by him about the Sudras.

43. The passage in Manu runs thus:

Manu, IX, 179. Translated by Gitidy and Haughton thus:

* * * * * Manu, IX, 179.

44. Translated by Grady and Haughton thus:

"But a son, begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage, if permitted by the other sons : thus is the law established," * * * (anugnatah) has been rendered as if permitted by the other sons, which is wrong--it means, if permitted or directed by the father. See Kallukbhatta's note on the above passage. He reads "iti dharmo vyavasthita," as "iti shastra vyavastka niyata," that is to say, this is the established vyavastha of the Shastras.

45. The Dattaka Chandrika also supports itself by Manu IX, 157, which runs thus:

For a Sudra is ordained a wife of his own class, and no other; all, produced by her shall have equal shares though she have a hundred sons.

46. The Dattaka Chandrika says that the "hundred sons" must refer to different classes of sons, otherwise it would be merely a repetition of the earlier general rule laid down in Manu, and unmeaning.

47. The Dattaka Chandrika also supports itself by the following from Yajnavalkya:

133.--A son begotten by a Sudra, even though upon a female slave, may take a share by choice.

134.--But after the death of the father, the brothers should make him a half sharer-if he have no brothers, he may take the whole property, unless there are sons of daughters.

48. The Mitakshara note on the above is: "A son begotten by a Sudra on a female slave, obtains a share by choice (kamatah) that is," by the option of the father. But after (the death of) the father, if there be sons of a wedded wife, then these brothers should make that son of the female slave a half sharer. That is, they should give him a half from their own allotment. However, should there be no sons of a wedded wife, the" son of the female slave shall take the whole estate, provided there be no daughters of a wedded wife, nor their sons. But if there be such, the son of the female slave participates for half a share only. From the mention of a Sudra in this place, moreover, (it follows that) the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor even a half, much remote (is the chance of his claiming) the whole. But, if he be docile, he receives a bare maintenance." (Collection of Hindu Law Texts edited by Gbarpure, published by Nirnaya Sagar Press, Bombay, 1910).

49. The translation of these passages by MacNaghten and Colebrooke (Tarbalankar's Edition, 1870, page 331) is practically the same, but we have quoted the above passage from Gharpure, as he follows the text more closely.

50. It appears from the above that the law, does not give the illegitimate son of a Sudra a right to a share in his father's lifetime. The father may, if he chooses, (kamatah) give him an equal share with his legitimate sons, and it is only upon the father's death that he becomes entitled to a moiety of the share of the legitimate son.

51. The law does not require even a Sudra father to recognise such a son, probably with a view to discourage alliances with female slaves. Instead of creating a moral obligation for the maintenance of such a son out of the father's estate upon the taker of the inheritance, the law gives the illegitimate son of a Sudra the right to an equal share. The Dattaka Chandrika argues that if the illegitimate son of a Sudra gets an equal share, the adopted son, who is superior, a fortiori gets such a share. This, it is said, proceeds upon an assumption that the adopted son is superior to the son by a female slave. The right of the son by a female slave, it is argued, is based upon consanguinity, whereas an adopted son has no such claim. How then, it is asked, is he superior? That amongst the regenerate classes the adopted son is superior to the illegitimate son, is not questioned. He has a legal status, the illegitimate son has none. Even amongst Sudras the son by a female slave is not legitimate, and has no status as a son unless his father chooses to give it to him. The superiority of the adopted son in their case also follows my analogy. The adopted son is voluntarily brought into the family and given the position of a son. It does not, therefore, appear to us that the Dattaka Chandrika has made an incorrect assumption in asserting that amongst Sudras the adopted son is superior to the son by a female slave.

52. The first text referred to in the Dattaka Chandrika in V, 32, is evidently that in Vriddha Gautama which is quoted in the Dattaka Mimamsa thus (see Section V, 43): As for the text of Vriddha Gautama, "A given son abounding in good qualities (yatha jate) existing should a legitimate son be born at any time; let both be equal sharers of the father's whole estate."

53. It will be noticed that the Dattaka Chandrika uses the words *tatha jate* meaning (subsequently born) instead of *yatha jate*. A slight typographical variation would make *yatha jate* into *tatha jate*, and it is difficult to say which really is the correct expression. *Tatha jate* gives a natural meaning and is an ordinary expression, but *yatha jate* is not. It has severely taxed the ingenuity of commentators. The way it has been construed to mean "one possessed of good qualities" is not very convincing. This is how the Dattaka Mimamsa reads it: "That (passage) must be construed as supposing the former possessed of good qualities, and the legitimate son, destitute of same: on account of the epithet "yatha jate" (abounding in good qualities). He, in whom there is a jate, that is, an assemblage (*sarnulvi*) of good qualities, (implied by *yatha*), is *yatha jate*--one abounding in good qualities. This is the meaning; for, the term, "yatha" is significant of similitude, depending on quality."

54. The meaning given in Dattaka Mimamsa is said to receive support from Manu IX--141, which runs thus:

Of the man, to whom a son has been given, according to a subsequent law adorned with every virtue (* * * * * "Upapannagunai"): that son shall take a fifth or sixth part of the heritage, though brought from a different family.

55. The Dattaka Chandrika says that the above passage from Vriddha Gautama, really refers to Sudras only, which seems to me to be a natural and logical conclusion. His argument is that it refers to a separate class not to the regenerate classes, as otherwise the unequal shares mentioned for the regenerate classes in the Smriti cannot be reconciled. To reconcile Vriddha Gautama's text with those texts a forced interpretation has to be given after adopting such an unusual expression as yatha jate for a natural and easily intelligible expression as tatha jate.

56. The Mitakshara says in the passage above quoted that the sons of a wedded wife should give the son of the female slave half from their own allotment. This is made clear by Balambhatta, page 182, 11, 22-23, also Subodhini, page 61, 1, 26 (same edition) which runs thus: "From the entire estate, a half of what would be regarded as his share, i.e., one-half of the amount allotted to a legitimate issue."

57. This question about the Sudra adopted son and an afterborn legitimate son's share has been dealt with in Dattaka Siromoni compiled by Professor Bharat Chandra Siromoni of the Sanskrit College at Calcutta, an eminent Sanskrit scholar held in high respect in Bengal. It is a very valuable treatise on the law of adoption, which was published in 1867.

58. It comprises the following treatises on the law of adoption: 1. Dattaka Mimansa: 2. Dattaka Chandrika: 3. Dattaka Nirnaya, (a compilation by Srinath Bhatta, a celebrated Pandit referred to in MacNaghten's Considerations on Hindu Law, Preface, page xiii): 4. Dattaka Tilaka (referred to as a fragment of valuable commentary on Hindu Jurisprudence by Bhavadeva, an old writer on Hindu rituals also mentioned in Colebrooke's Digest): 5. Dattaka Darpana (a modern digest): 6. Dattaka Kaumudi (referred to in MacNaghten's Principles and Precedents of Hindu Law, Vol. II, page 200): 7. Dattaka Didhiti referred to as a work of authority in the evidence of Ramcoomar Siromoni in Srimutty Degumberry Dahy v. Srimutty Taramoney Baby quoted in MacNaghten's Hindu Law edition 1824 Appendix xiii; 8 Dattaka Siddhanta Munjuri (also a modern digest).

59. After discussing the various authorities in Chapter X the learned author of Dattaka Siromoni concludes thus (see page 194/2):

* * * * *

60. The meaning of the Shastras is that amongst Sudras the adopted son takes equal share with the natural son.

61. In Dattaka Kaumudi, page 25, we have the following:

* * * * * The proof of this is set out in Vidhanamala. If after the adoption an

aurasa son be born (yada jate) they become equal sharers of the whole of the father's estate.

62. It will be noticed that in the above the reading is again different. It is neither yatha jate nor tatha jate but yada jate which means, when born, which is practically the same as tatha jate.

63. Vidhanamala is undoubtedly an ancient work of authority. Dattaka Didhiti also supports the same view. Having regard to the above we cannot say that the Dattaka Chandrika has in any way deviated from the Smritis and inasmuch as the rule laid down in the Dattaka Chandrika in the case of Sudras has been accepted as correct by both the Madras and Calcutta High Courts, we think the matter must rest there.

64. In this case the adopted son also takes an equal share according to the ehrar-patra (Exhibit 13) which runs thus:

If by the blessing of God, a son of my loins is born, both of them shall be equally entitled to all the aforesaid moveable and Immovable properties which may be left by me, and the son born of my loins shall not be entitled to claim a larger share in them, and if he does so, it shall be rejected.

65. We hold that the ehrar is valid and operative.

66. In the Andul case, namely, that of Surendro Keshub Boy v. Doorgasoondery Dossee 19 C. 513 (P.C.) : 19 I.A. 108 the ekrar was held binding as between the Ranis, the adoptive mothers, and it was further held that the adopted sons could insist upon the performance of the contract by which each Rani bound herself to the other to deal with the estate in their favour. In Bhala Nahana v. Parbhu Hari 2 B. 67 it was held that, where a person by an express promise to settle his property upon the boy induced his parents to give him in adoption, but died without having executed a settlement, the equity to compel the heir and legal representative of the adoptive father specifically to perform his contract survived, and that the property in the hands of the widow, the heir-in-law in that case, was bound by that contract.

67. Asita Mohan, the afterborn son, also relies upon the ehrar (Exhibit 13) in support of his contention that according to its terms the debutter properties do not go to the adopted son or his heirs.

68. We hold that in law and according to the ekrar Sailendra was entitled to one half of the secular properties and his sons are now entitled thereto.

69. Debutter:

The appeals so far as they relate to the debutter properties fall under the following heads:

1. That the properties alleged to be debutter are not so.
2. That in law the adopted son has no right to be treated as a shebait in respect

of the debutter properties in the presence of the natural-born son.

3. That in this case the adopted son cannot make any such claim having regard to the ehar.

70. Before dealing with these contentions it is necessary to give a short account of the family to follow the history of the creation of the debutter properties and the dealingstherewith. It is necessary to begin from the time of Nrisingha Deb Ghose Moulik who died about 1200, B.S. (1793-94). He left him surviving his brother named Gobind Deb, his widow Lakshiswari, a son named Badan Chandra Ghose Moulik and Brojomoni, a daughter. Badan Chandra died on the 6th Sravan 1213. He executed two documents on the day of his death, namely, a muhtipatra (Exhibit 14) in favour of his mother Lakshiswari by which he appointed her manager of his estate and an anwmatipatra (Exhibit 46) in favour of his wives Khudumoni and Bhubaneswari. Shortly after his death, namely, on the 17th of Sravan 1213, his two wives executed an ekrar-patra (Exhibit 47) in favour of their mother-in-law Lakshiswari, by which they acknowledged and confirmed her appointment as manager and harta of the estate left by their husband, and agreed that she was to get her name registered in the Collectorate, and also stipulated that in the event of their adopting a son, he would in his turn be registered as proprietor. Lakshiswari thus took possession of the estate and got her name registered in the Collectorate Records. It appears that Lakshiswari had some litigation with Gobind Deb, but they settled their dispute by a deed of compromise dated the 18th Assar 1220 (Exhibit 15), which recited amongst other things that Gobind Deb had separated from Lakshiswari and Badan in 1204. Lakshiswari continued in possession of the estate until the 26th Joistha 1230, when she withdrew from the management and executed a deed of relinquishment (Exhibit 48) in favour of her surviving daughter-in-law Bhubaneswari, empowering her to get her name registered and to manage the estate until she adopted a son, and pending his minority. Lakshiswari also executed about this time two debutter patras, VI and V2, in favour of her widowed daughter Brojomoni as shebait, namely, on the 26th Joistha 1230 and 30th Joistha 1320, respectively. She died on the 11th Assar 1230. Bhubaneswari adopted a son named Krishna Kinkar, who married three wives, Kristapriya, Monmohini and Kristamoni, by whom he had three daughters but no son. He accordingly executed an anumatipatra, dated the 14th Kartik 1351 (29th October 1844), in favour of two of his surviving wives, namely, Kristapriya and Kristamoni, giving them permission to adopt, but provided that his mother Bhubaneswari was to continue as the manger of the estate during her lifetime and after her death the widows were to be the managers, until the adopted son came of age. They adopted a son named Radha Mohan and on the 29th Sravan 1272 (12th August 1865) executed an ekrarpatra (Exhibit 45) in favour of Bhubaneswari and Radha Mohan, leaving the management in Bhubaneswari's hands, and giving up their rights in the estate in consideration of some properties given to them by way of maintenance. This deed also provided that the estate was to vest in Bhubaneswari after their death and in Radha Mohan

after Bhubaneswari's death. On the 6th Pous 1286 (20th December 1879) Bhubaneswari executed a "deed of gift and relinquishment" (Exhibit T) in favour of Radha Mohan "as he was at that time fit to manage the estate and to take it out of the hands of the Court of Wards," which had in the meantime taken possession, owing to the incompetency of the proprietor. Radha Mohan thereafter took possession of the estate from the Court of Wards and the contest is now between the sons of his adopted son Sailendra, and Asita Mohan his afterborn natural son.

71. The debutter properties in suit are said to belong to two deities, namely, Radhakant Jiu and Jiu Shiva Durga. So far as the latter, is concerned, there is no physical image, but p:ojas of both have been carried on in the family for a considerable time, the poojas of the latter being held annually at Durga poojah time.

72. Of the debutter properties Taraf Harishpur alone is said to have been dedicated to Joy Shiva Durga and the rest are claimed on behalf of Radhakant Jiu. We intend to deal with individual items of the property in the order in which we have summarised the findings of the learned Subordinate Judge.

(1) Kismat Binderpore.--The learned Subordinate Judge had held that this property is not debutter and was never treated as such.

73. It is said to have been endowed by Lakshiswari by a deed of gift, Exhibit M, dated the 8th Bysakh 1226, in favour of Radhakant Jiu.

74. Asita Mohan is the only witness who speaks of the production of Exhibit M from proper custody. He did not search for it, he had never seen it before he got it from one Gobind Adhikari who was in charge of the estate daftarkhana, Gobind Adhikari did not tell him where he had got it from. Gobind is still in his service but has not been called. We hold with the learned Subordinate Judge that the production of Exhibit M from proper custody has not been proved.

75. It is a document written on plain paper and is not registered. A large number of other documents executed during the time of Lakshiswari's management, both before and after the date of Exhibit M, appears, all of them, to have been registered. Its nonregistration is a circumstance which has to be remembered in considering the question of its genuineness.

76. Exhibit 36(2), which is a certified copy of the Decennial Settlement, shows that Kismat Binderpore was settled by the Government with Gobind Deb for the years 1197 to 1206, B.S.

77. Exhibit 40 (2), dated 28th Ohaitra 1212 = (9th April 1806, is Badan's application for registration of his name as proprietor, in which he alleged that Gobind Deb was the benamidar.

78. Lakshiswari is said to have dedicated this property by Exhibit M in 1226. She was at that time managing the estate of Badan under the muktapatra. She had

no right to dedicate any property either as mukhtear, or as executor if the muhtipatra be held to operate as Badan's Will. She gave up her management in favour of Bhubaneswari in 1233 by Exhibit 48. In that document Binderpur is one of the properties mentioned by name as belonging to the estate. There is a Clause in that document which runs thus-"That you (Bhubaneswari) shall maintain the service and worship of the deities established by your husband according to custom, preside over your husband's house, etc." This is a general direction to the lady to manage the estate and keep up the shevas. It does not support the contention that Binderpur was tfeated as debutter property at that time. The document taken as a whole rather goes against such a contention, as Binderpur appears in the schedule of properties therein set out as belonging to the estate of Badan. It directs Bhubaneswari to get her name registered in respect of such properties in her place.

79. Exhibit 42 (2), dated Aswin 1230 = 17th September 1823, shows that Bhubaneswari got her name so registered.

80. Exhibit 12, dated 18th Sravan 1275 = 1st August 1868), is an ijara lease granted by Bhubaneswari of the mal and kharidji lands of five inauzas including Binderpur. It is not clear from it what property is referred to as "dedicated to the service of the deities," but it is clearly not a lease granted as shebait and the bulk of the lands leased seems to be mal lands.

81. Bhubaneswari relinquished her management in favour of Radha Mohan by Exhibit T, dated 6th Pous 1286 = 20th December 1879. This deed recites that "Radha Mohan is the sole reversionary heir to the properties," that he is "entitled to exercise the right of sale and gift in those properties and to remain in possession of them from generation to generation in succession in any way he pleased." In the list of properties Binderpur is not specifically mentioned as debutter. This document purports to transfer the zemindaris, mal, debutter, etc., to Radha Mohan and. contains a general direction that he should perform the service of the deities, etc.

82. We have from the mutation decree, Exhibit 50(11), date illegible, that Nabin Krishna Banerjee as manager for Bhubaneswari was registered for Binderpur and from Exhibit 50(10), dated 15th January 1881, that Radha Mohan was registered as proprietor of that mauza, neither of them as shebait for the (hahur From 1201, as shown from Exhibit 51(2), up to 1881 in the Collectorate Records the zemindars are recorded as proprietors, not as shebait. In Exhibit 24, dated 3rd Vadra 1308 = 19th August 1901) which is a habuliyat by a tenant in favour of Radha Mohan in respect of certain chowkidari chakran lands. Kismat Binderpur is referred to as appertaining to his zemindari. From Exhibit 58, a hastabad and terij prepared in 1288, Binderpur appears to have been treated as part of the zemindari estate. Dakhilas for a great number of years, Exhibit 25 series and Exhibit 26, are in the name of the zemindars as owners.

83. The receipts from the property and payments of its Government revenue are

entered in the mal accounts of the family. Although payments for land revenue of the other debutter properties are shown in the debutter accounts, such payment for Binderpur is not there shown.

84. The above facts show that the learned Subordinate Judge was quite right in holding that Binderpur was not debutter property and has not been treated as such.

85. The mere reference to the properties in Exhibit 12 "dedicated to the service of the deities", even taking that reference as relating to Binderpur, cannot lead one to conclude that Binderpur was really debutter property.

86. Exhibits VI and V2 both of June 1823 and which are registered debutter deeds executed by Lakshiswari in favour of the deity Radha Gobind Jiu, appointing her widowed daughter Brojomdini as shebait, make no reference to Exhibit M, or to Binderpur as having been previously dedicated. Exhibit M has, however been sought to be supported by another unregistered document (Exhibit C) which is an arpannama, said to have been executed by Bhubaneswari on the 4th Bysakh 1253. The date on this document appears to have been altered and some other documents, such as the Collector's rubokari (Exhibit A2) for registration of Bhubaneswari's name as shebait, dated 18th Baisak 1273, which makes no mention of Exhibit C, throw doubt on its genuineness.

87. It is pointed out that both Exhibit M and Exhibit C bear a note that they were filed in a case before the Deputy Collector. There is no evidence, however, that they were actually so filed.

88. To sum up, having regard to the registration of the names of the zemindars as proprietors, not as shebaits, to the dakhilas in their names as zemindars, to the absence of entries relating to the properties in the debutter accounts as above mentioned, to the payment of Government revenue from the mal accounts, and the non-registration of the deed of endowment, Exhibit M, when the bulk of the documents of transfer executed by members of the family are found to have been registered, and the want of proof that Exhibit M was produced from proper custody, support the finding of the Subordinate Judge, which we uphold.

89. The Trial Court has also found that Harishchandrapur is not debutter property and we agree with that finding, and as there is no appeal from it by Asita Mohan, we need not deal with it any further.

90. As to the properties found to be debutter by the Trial Court We shall deal with them in the order in which they appear in his judgment.

Harishpur.

91. This property is shown to have been purchased in 1192 B.S. by Nrishingha Deb Ghosh Moulik as shebait in the name of the deity Joy Shiva Durga. See Exhibits S3 and S2 (where his name appears as Nursing Ghose), dated 1st Chait

1192 B.S. and 21st Chait 1192 Respectively. The habuliyat for the Decennial Settlement for this estate from 1197 to 1206 B.S. was executed by Nrisingha Deb as such shebait. See Exhibit SI. We find from Exhibit W2, dated 13th July 1807, that Government revenue was paid for it by Lakshiswari as shebait and Exhibit E4, dated 1st Aghran 1287, that Bjadha Mohan applied for registration of his name as shebait. This exhibit also shows that before him Bhubaneswari was recorded in the register as shebait, although the rubokari Exhibit 42 (2), dated 17th September 1823, in respect of Bhubaneswari's application for registration does not specifically show that she applied to have her name registered as such shebait.

92. It is clear from the evidence that there has been an annual puja held in the family in the name of Joy Shiva Durga. No doubt the mere purchase of an estate in the name of a thakur does not prove a dedication see *Bajmohun Gossain v. Gourmohun Gossain* 4 W.R. 46 (P.C.) : 8 M.I.A. 91 : 1 Suth. P.C.J. 378 : 1 Sar. P.C.J. 723 : 19 E.R. 464 and *Maharanee Brojosoondery Bebea v. Ranee Luchmee Koonwaree* 20 W.R. 95 : 15 B.L.R. (P.C.) 176 : 4 Sar. P.C.J. 810 but we think that the documents above referred to and the way in which the proprietors of the estate dealt with the property, show that Harishpur was validly endowed to the deity. No adverse inference can legitimately be drawn against the debutter character of the property from the fact that its income is entered in a separate account, nor in the books of account of the deity Itadha Gobind Jiu. That her puja expenses appear in the secular account is probably due to the fact that the income of the dedicated property was insufficient and had to be supplemented from the income of the secular estate. It is a small property and is shown to have been treated as debutter by successive holders of the estate and held by them as shebaits.

93. We have been asked to hold by the sons of Sailendra Mohan on the strength of Exhibit 15, which is a deed of compromise executed in Assar 1220 by Gobind Deb in favour of Lakshiswari settling the litigation above referred to, that inasmuch as Mauza Harishpur is there recited as belonging to Lakshiswari in her own right as her nij taluk, there is ample ground for holding that Nrisingha Dob Ghose Moulik acquired it in the benami name of the thakur to deprive his brother Gobind Deb, that it was put in the name of the thakur although it was really secular property. In support of this contention reference has also been made to the mukti-patra (Exhibit 14) in favour of Lakshiswari and the ehar of Lakshiswari (Exhibit 48) in favour of Bhubaneswari, where there is no specific mention of this property being debutter. We are unable to accede to this contention. The absence of a permanent image has also been commented upon. Such an image is not absolutely essential for dedication to a thakur. The Durga Puja is a periodical festival in Bengal and clay images of the thakur are built every year and thrown into a river after the puja is over. Such puja of Shiva Durga has been held every year for a long period in this family. We agree with the Trial Court that Harishpur is debutter property.

94. Huda Kutubpur (Fatehpur), Dayanagar and Hasnabad. Exhibits V1 and V2 and Exhibit 101 govern the above.

95. V-1 deals with Kutubpur and portion of Dayanagar, Exhibit 104 with Dayanagar and V2 with Hasnabad.

96. VI and V2 are taken together, as Lakshiswari purported to create these endowments appointing Brojomoni shebait. They were executed about the same time, namely, VI on the 26th Joistha 1230 and V2 on the 30th Joistha 1230. The endowment is in favour of the deity Radha Gobind which also appears to have been established about the same time. The thakur is in existence and has been located in a large thakurbari and its daily and periodical festivals have been conducted ever since. Separate accounts are kept in the name of the thakur and the sheva has been carried on by successive holders of the estate. Brojomoni got her name registered as shebait, see Exhibits E, E2 and US. Brojomoni acquired other properties out of the income of the endowed properties in the name of the thakur and got her name registered in respect of them as shebait. She paid revenue as shebait and remained in possession as such up to her death, which occurred in 1285 B. Section After her death Badan's heirs kept those properties separate and treated them as validly endowed, as also the properties acquired out of their income.

97. The originals of VI and V2 have not been produced. Asita Mohan was called upon to produce the original of one of them, but did not, and certified copies produced by him were admitted. The sons of Sailendra Mohan had in fact called upon Asita Mohan to produce VI and V2 and were ready to file certified copies upon non-production of the originals. We hold that VI and V2 have been properly admitted and that they are genuine documents.

98. It is to be noticed that Lakshiswari relinquished her management in favour of Bhubaneswari by Exhibit 48 on the 26th Joistha 1230, the same day she executed VI in favour of Brojomoni, and four days later, namely, on the 30th Joistha 1230, she dedicated further properties by V2 in Brojomoni's favour as shebait. It is quite clear she, as manager or executor, had no authority to create such debutters. It has been argued that these dedications were apparent, and that in substance they were by way of provision for Brojomoni, specially as the deeds provided that after Brojomoni's death Bhubaneswari was to succeed as shebait and after her the adopted son of Badan. It is no doubt capable of that inference, but it is quite possible also that Brojomoni was pious minded and Lakshiswari thought her a fit and proper person to act as shebait. Nothing has been placed before us to show that any fraud was contemplated. This has not even been suggested.

99. It is quite correct that Lakshiswari had no legal power to create such endowments, but the subsequent successors to the inheritance did not question their validity prior to this suit. No doubt in the list of properties made by the Court of Wards during its management, these properties were included in a

general list of properties belonging to the estate, as also in the schedule to Exhibit T, But we find from Exhibits BB1 and EE3, Radha Mohan applied as shebait in 1881 to have the name of the thakur registered in respect of Dayanagar, Kutubpur and Patehpur and it was so ordered.

100. Having regard to all the circumstances we hold that the above properties were debutter. We do not think we ought to, after this lapse of time, hold the endowments void.

101. Sreedharpur, Paharpur and portion of Kutubpur.--These were purchased from the income of the other three.

102. Exhibit N1 is the conveyance of Sreedharpur in favour of the idol represented by Brojomoni as shebait, dated 6th Falgoon 1237.

103. Exhibits O and P (dated 3rd Joistha 1238 and 28th Joistha 1237) are similar conveyances of Paharpur and Exhibit Q, dated 27th Ohoitra 1237, is a similar conveyance in respect of 7 1/2 annas of Kutubpur.

104. It is conceded by the appellants that our decision in respect of the other three will also govern these properties. We hold that they are debutter.

105. The last one of the properties we have to deal with is

Mohonpur.--Lakshiswari obtained this property as a gift from her father. See Exhibit Y, dated 25th Agran 129S. Exhibit R, dated 14th Kartik 1251, is the anumati-patra in favour of his widows executed by Kristo Kinkar. It also purports to assign Mohonpur as additional estate for the thakur Radha Grobind. The ekrarf Exhibit 45, of 12/2 executed by the widows in favour of Bbubaneswari and Radha Mohan contains a recital that Mohonpur is dedicated to the thakur and we find from Exhibit AA4 that in 1287 Radha Mohati got the thakur registered in the Oollectorate as proprietor represented by him as shebait.

105. We hold that Mohonpur is debutter. In fact it has not been seriously contested that it is not.

106. The sons of Sailondra Mohan have, however, submitted that as the income of the debutter properties exceeds the expenditure for deva sheva and inasmuch as large sums of money from the deva sheva fund have been shown to have been spent in Radha Mohan's time in payment of his personal debts and expenses, as also for the maintenance of the daughters of Kristo Kinkar, we should hold that the above properties were only charged to the extent of the amount necessary for the sheila and the balance of the income should be declared divisible as secular property. The learned Subordinate Judge has found that the income of the debutter properties is roughly between Rs. 6,000 and Rs. 8,000 and the expenses have been variously estimated between Rs. 3,000 and Rs. 5,000. It may be that there is a small margin left over, but as we find that there was a clear intention of creating the properties dibutter and they were treated as such by the subsequent holders of the estate, although Radha Mohan

appears to have spent some of the income on his personal account and also to have mortgaged Paharpur without mentioning that it was¹ debutter property, we do not think it would be right to hold on the materials before us that the properties were not absolutely dedicated, but are merely charged with deva sheva expenses. All the documents show that these were genuine endowments, and intended to be absolute.

107. The next question is as to the right of Asiti Mohan and Sailendra's sons to be treated as co-sharers. The learned Subordinate Judge has held against the latter, basing his judgment mainly on the ekrar executed by Radha Mohan, Exhibit 13. He rightly holds that shebaitship can be held in shares and separate palas may be directed. Ordinarily the right to shebait ship of family deities goes by inheritance unless otherwise provided by the deed of endowment. The learned Subordinate Judge, however, seems to think that inasmuch as in the presence of the natural-born son, the adopted son is not competent to perform the kritiyadis and no specific mention is made in the ekrar in this case relating to the adopted son's right to the shebaitship, Sailendra had no right to it, and so Sailendra's sons have no such right. When he is speaking, of kri'yadis, he is referring collectively to deva kritiyas and pitri kritiyas, namely, the shevas and shrads. It is now settled law that as regards inheritance the adopted son holds in all respects the same position as an aurasa son, except in some special matters. Let us see if there are any specific rules excluding him from shebaitship in the presence of the aurasa son. We find that in the presence of the aurasa son, the adopted son's right to perform certain shrads is cut down. If after adoption a natural son is born to the adopter, then the adopted son cannot perform the adya or first shrad, the twelve monthly shrads which follow, the six-monthly and the anniversary shrad and the sapindi-karan (see Sarkar on Adoption--Tagore Law Lectures, 2nd Edition, page 388). Subject to this restriction, however, he can perform all the other shrads like the aurasa son, with this variation that the anniversary shrads have to be performed by him in the ekoddista form in honour of the deceased only and by the aurasa son in the parvana mode, in which a double set of three oblations are presented. So the aurasa son has a superior right in respect of pitri-matri kritiyas, but there is no such preference in respect of shevas or deva kritiyas.

108. The learned Subordinate Judge has drawn an adverse inference against the adopted son inasmuch as no reference is made in the ekrar, Exhibit 13, to his having equal rights in the debutter properties, while there is such a reference to his succeeding to the secular properties.

109. The passage in the ekrar runs thus:

From this day the aforesaid adopted son has become entitled to all my properties, moveable and immoveable, and to perform the services of the idols and all rites and ceremonies in connection with maternal and paternal ancestors. After my death, he shall perform the services of the deities and live in my ancestral residence at Punchthopi, and being vested in all my rights, and entitled to the ownership of these properties, be shall protect, enjoy and possess them

by exercising the rights of sale and gift, and shall maintain all my rites and ceremonies. If by the blessing of God a son of my loins is born, both of them shall be equally entitled to all the aforesaid moveable and Immovable properties which may be left by me, and the son born of my loins shall not be entitled to claim a larger share in them, and if he does so, it shall be rejected.

110. In the second portion there is no reference to the right to perform the service of the idols, but we are unable to agree with him in construing the silence into a denial of the right. The right has not been expressly taken away, nor can it be said to have been taken away by implication. It is difficult to draw such an inference on the supposition that the adoptive father must be taken to have known that the natural son has some superiority over the adopted son in respect of shrads, and his intention was accordingly to disqualify him from sharing the shevas. Such a conclusion is far-fetched. The learned Subordinate Judge also supports his decision on the ground that it appears from Narendra's evidence that the question of debutter properties was discussed at the time of the adoption, and he says that because nothing is mentioned in the ekrar about them, it must be taken that Radha Mohan intended to exclude the adoption in case of the birth of an aurasa son. This is based on the following passages in Narendra's evidence which appears in his cross-examination:

Q.--Was there any talk about the debutter properties at the time of the ekrar?

A.--Not at the time of the ekrar, but when the draft was being made.

Q.--What was it?

A.--Radha Mohan Babu proposed that in case he gets a natural-born son, he would have the right to perform the deva kirti and pitra kirti, that is, he did propose but not accepted, neither inserted in the deeds.

Q.--Again I ask, was there any talk regarding debutter properties? (Objected to).

A.--Radha Mohan Babu said he got the debutter properties and in case he gets a natural-born child, he would have control over the debutter properties, but it was not accepted, but as, it tantamounted to carving of the property, for good or bad reasons, I did not agree, and hence it was not inserted in the deed.

111. It is quite possible that if there was a discussion at the time, and Narendra did not agree to Radha Mohan's suggestion about the debutter properties, the matter was dropped and the law was left to take its own course. If it was settled that the adopted son was not to get it at all, Radha Mohan could have easily inserted in the deed that the adopted son would have no such right in the presence of the aurasa son. Neither of them has any interest in the debutter properties except as shebait, and it is quite conceivable that the adopter did not think it necessary expressly to provide for the contingency.

112. We hold, therefore, that Sailendra's sons are entitled to take eight annas in the properties found by the Subordinate Judge and ourselves not to be debutter

and that they are jointly entitled to rank as shebaites equally with Asita Mohan in respect of the properties found by both Courts as debutter. For convenience of the shevas the properties are to be held under joint management, but the periods of the sheva may be divided into six-monthly palas or annual palas or in alternate years, as they may arrange between themselves, failing which liberty is given to them to take the direction of the Court.

113. During the progress of the appeal we were informed that the parties had settled their disputes amicably and the matter was allowed to stand over for recording the settlement, subject to our sanction, as infants were involved. We regret that in spite of the advice of the learned Vakils the settlement has fallen through. The estate is not a large one and may be lost in this somewhat expensive litigation.

114. Asita Mohan's appeal fails in every respect and is dismissed with costs.

115. The appeal of Nirode Mohan and others succeeds as regards their right to shebaitship and we allow their appeal with half costs.