

(1956) 01 BOM CK 0026

Bombay High Court

Case No: A.F.O.D. No. 53 of 1953

Malojirao Abajirao

APPELLANT

Vs

Tarabai Nathajirao and Others

RESPONDENT

Date of Decision: Jan. 11, 1956

Citation: AIR 1956 Bom 397

Hon'ble Judges: Vyas, J; Chainani, J

Bench: Division Bench

Advocate: V.S. Desai, M.B. Kadam and S.G. Ghurya, for the Appellant; V.V. Albal, for the Respondent

Judgement

Vyas, J.

This appeal arises out of a judgment and decree passed by the learned Civil Judge (S.D.) at Satara in Special Suit No. 15 of 1950. This suit has been filed by the plaintiff-appellant Kalojirao Abajirao Bhoite for a declaration that he is the Owner of the suit properties and accordingly entitled to enjoy the income and recover possession of these properties from the defendants.

The suit properties comprise of serial numbers 1 to 24 and a Wada situated at Hingangaon, a village in the district of North Satara. The suit had been filed upon a contention that the plaintiff was adopted by Abajirao Nathaji as a son to himself on 12-9-1913.

The suit has been resisted by the defendants upon the grounds (1) that the plaintiff's adoption by Abajirao was invalid as Abajirao was an idiot and of unsound mind and also a leper and that therefore the plaintiff is not entitled to succeed to the estate of Abajirao, (2) that Maruti Tukaram the husband of defendant 1, was adopted by Bai Babai, widow, of Maruti Abajirao as a son to her deceased husband and was thereafter known as Nathaji Maruti, (3) that after the death of Maruti Tukaram, whose name changed to Nathai Maruti after his adoption by Bai Babaisaheb, his widow, defendant 1, adopted defendant 2 as a son to her deceased

husband, (4) that the suit properties had become Stridhan properties of Bai Babai by reason of her adverse possession thereof, and (5) that defendants 1 and 2 being the stridhan heirs of Bai Babai are entitled to succeed to the suit properties.

The learned trial Judge has held all the three adoptions proved, namely, the adoption of the plaintiff by Abajirao, the adoption of Maruti Tukaram, the husband of defendant 1, by Bai Babai, the widow of Maruti Abajirao, and the adoption of defendant 2 by defendant 1. He has further held that the properties at serial Nos. 1 and 2 and the Wada were given by the plaintiff to Bai Babai for her maintenance in the year 1931 and therefore the plaintiff is entitled to the exclusive possession of these properties.

So far as the properties at serials Nos. 3 to 24 are concerned, the learned Civil Judge has found that Bai Babai was in adverse possession thereof from 1933 till her death in 1947, that therefore these properties ensured to the estate of Abajirao upon the death of Bai Babai and that accordingly the plaintiff, as the adopted son of Abajirao, is entitled to half share therein and the defendants, by virtue of the adoptions made by Bai Babai and by defendant 1, are entitled to the other half share therein.

The plaintiff and defendants 1 and 2 being dissatisfied with these findings have appealed and cross-objected against them. The plaintiff contends in the appeal that there was no valid adoption of Maruti Tukaram, the husband of defendant 1, by Bai Babai, that there was no valid adoption of defendant 2 by defendant 1, that even if the adoption of defendant 2 by defendant 1 be held proved, it would be of no avail in the absence of a valid adoption of Maruti Tukaram by Bai Babai, that the possession of the properties at serial Nos. 3 to 24 by Bai Babai was not adverse, that even if it was adverse, possession by Bai Babai, the plaintiff is the only stridhan heir of Bai Babai, as Bai Babai had no issue from her husband & as there was no valid adoption of Maruti Tukaram by Bai Babai and that therefore the plaintiff is entitled to the exclusive possession of the suit properties. The defendants, on the other hand, challenge the validity of the plaintiff's adoption by Abajirao. They contend that the plaintiff's adoption was invalid and therefore the suit must fail.

2. In order to appreciate the contentions of the parties to this litigation, it is necessary to set out the relevant facts. One Nathaji Maloji was the owner of a large estate including the suit properties. His only son Abajirao was a simpleton. He was suffering from the defects of inarticulate speech and deafness. He had married about five times and had a son of the name of Maruti.

Maruti was married to Bai Babai. This Maruti predeceased his father Abajirao. He died on 15-5-1912. As Nathaji Maloji was getting advanced in age and as he felt that Abajirao was a simpleton, he applied in the year 1894 to the District Court; and in that application he prayed that the Collector of Satara in his capacity as Court of Wards should be requested to take over the management of his estate.

In that application Nathaji Maloji alleged that he had become old and that his son Abajirao was a lunatic and incapable of managing a large estate. Upon the above mentioned application of Nathaji Maloji, the District Court at Satara directed the Collector to take charge of Nathaji's estate, but for reasons which are not clear on the record, the Collector of Satara did not take charge of Nathaji's properties.

When Nathaji saw that the Collector for some reason was not willing to take over the management of his estate, he made a will of his entire estate on 10-7-1900. By that will he appointed his friend and creditor, one Rautimal, as an administrator of his entire estate. A fortnight later, on 25-7-1900, Nathaji died and Rautimal took possession of his entire estate in his capacity as an administrator appointed under the will of Nathaji.

Rautimal filed Misc. Appln. No. 3 of 1900 for obtaining a probate of the will and for recovering possession of Nathaji's estate. In that application Rautimal obtained a probate of the will and also got possession of the entire estate of Nathaji Maloji. In the year 1902, Abajirao filed Misc. Appln. No. 89 to the District Court of Satara praying for accounts of the income of his estate from Rautimal. He also prayed for the revocation of the grant of probate of his father Nathaji's will to Rautimal.

Upon that application, which was filed by Abajirao, the Court instituted an inquiry regarding sanity or soundness of mind of Abajirao. Abajirao was kept for several days under the observation of the Civil Surgeon of Satara and the Civil Surgeon opined that he was of sound mind & was suffering from the defects of inarticulate speech and deafness.

Ultimately Abajirao and Rautimal compromised their dispute, whereafter Rautimal managed the estate of Abajirao as the agent of Abajirao. On 12-9-1913, Abajirao adopted the present plaintiff. Malojirao and executed an adoption-deed in that connection. The adoption-deed itself Ex. 99 was executed on 22-9-1913. It may be noted that after the above-mentioned adoption-deed, both the plaintiff and his adoptive father, Abajirao started alienating some of the family properties.

In the year 1916, Abajirao filed Suit No. 20.) against Rautimal and Bai Babai and in that suit he asked for a declaration that the kabulayats, which had been taken by Rautimal in respect of the suit properties, were wrongfully taken and were therefore void. He also asked for an injunction to restrain Rautimal from recovering the amounts of rent from the tenants under suit kabulayats. In the said suit Abajirao also asked for accounts of the income of the properties from Rautimal.

It may be noted that Abajirao died in the year 1918. Thereafter the present plaintiff, Malojirao, as the adopted son of Abajirao, prosecuted the above-mentioned Suit No. 205 of 1916. The suit was decreed on 29-9-1919. By the decretal order the possession of the suit properties was ordered to be given to the present plaintiff. It was a decree which was passed against Rautimal and Bai Babai.

After the decree was passed Bai Babai took the matter to arbitration for the settlement of her dispute With the present plaintiff. The arbitrators gave their award in the same year, that is, in the year 1919 and it was provided by the award that Bai Babai and the present plaintiff Malojirao should have a Wada in Hingangaon, where Bai Babai should be permitted to live according to the dignity of the family.

It was provided that if Bai Babai and this plaintiff Malojirao could not agree, a portion of the Wada, namely, a portion of 10 khans, should be given to Bai Babai for her residence. It was further provided that the present plaintiff should go on paying Rs. 400/- a year towards the maintenance of Bai Babai. This amount of Rs. 400/-

was to be paid in two installments every year, the first installment of Rs. 200/- falling at the end of January of each year and the next installment of Rs. 200 falling at the end of March every year.

It was also provided that a sum of Rs. 5000/- should be paid by Malojirao to Bai Babai for pilgrimage. This award was filed in the Court by Bai Babai herself and a decree was passed by the Court in terms of the award. Thereafter in the year 1931, on 28-5-1931 to be precise, an agreement took place between Malojirao and Bai Babai. Pursuant to this agreement three properties, namely, S. Nos. 25, 420 and 192 of Hingangaon were given to Bai Babai for maintenance. The total annual income from these properties was about Rs. 300/-.

These lands were, given to Bai Babai together with the trees, shrubs, well, water course, etc., which were situated upon these lands. Five months later, on 24-8-1931, the above-mentioned agreement was substituted by another agreement, according to which two lands, namely, S.N. 26 and S.No. 38 of Hingangaon, were given to Bai Babai by the present plaintiff Malojirao for her maintenance.

The area of S. No. 26 was 7 acres and 17 gunthas and its assessment was Rs. 32-8-0. The area of S. No. 33 was 7 acres and 24 gunthas. The approximate value of these two properties was Rs. 1500/-. It would appear that the above mentioned two properties, namely, S. No. 26 and S. No. 38 of Hingangaon are the suit properties at serial Nos. 1 and 2.

3. Proceeding further, in the year 1934, Bai Babai executed and adoption deed, Ex. 187 on 25-10-1934. By this deed, Bai Babai purported to adopt Maruti Tukaram, the husband of the present defendant 1 Tarabai, as a son to her deceased husband Maruti Abajirao. After the adoption the boy Maruti Tukaram, who was then (in the year 1934) about 10 years of age, was named Nathaji Maruti.

After this alleged adoption of Maruti Tukaram by Bai Babai, a group photograph was taken. At that time, that is, in the year 1934, Maruti Tukaram was attending a school in Bombay. Two applications were sent to the authorities of that school. The first application was made on 5-7-1935 and the second application was made on 11-12-1935. By those applications, a request was made to the school authorities to

change the name of Maruti Tukaram into Nathaji Maruti.

The school authorities, however, did not agree. They replied to the first application, by Ex. 116. It was stated by the school authorities in this reply that unless a certificate of a Justice of the Peace or a Magistrate was sent to the School authorities in support of the change of name from Maruti Tukaram to Nathaji Maruti, the change could not be effected in the records of the school.

It was pointed out by the school authorities in this reply that if for some reason such a certificate was not obtainable from a Justice of the Peace or a Magistrate, the original papers pertaining to the making of a change in the name of the boy Maruti Tukaram should be forwarded to them.

By Ex. 117, the school authorities replied to the subsequent application. By this reply the school authorities stated that if the papers pertaining to the alleged adoption of the boy Maruti Tukaram were forwarded to them, then only the name of Maruti Tukaram could be changed to Nathaji Maruti in the records of the school.

It may be noted that notwithstanding these replies of the school authorities, which were sent to Bai Babai, no attempt was made by Bai Babai or anybody else on her behalf to send the adoption deed, Ex. 187, or the group photograph in support of their contention that the boy Maruti Tukaram was taken in adoption by Bai Babai and that thereafter his name was changed to Nathai Maruti.

In the same year, that is, in the year, 1934, Bai Babai filed Suit No. 92 against the present plaintiff Malojirao and Rautimal for recovering possession of Abajirao's properties. In that suit one Tukaram Bala Jadhav, purporting to act as the next friend of the alleged adopted boy Nathaji Maruti, applied to the Court that since Nathaji Maruti had been adopted by Bai Babai as a son to her deceased husband, his name should be entered as a co-plaintiff in the suit.

This application was granted by the Court. Bai Babai also had applied to the Court in the same connection stating that on 25-10-1934 she had adopted Nathaji Maruti as a son to her deceased husband and that therefore his name should be entered along with that of herself as the plaintiff in the suit.

It may be noted that the above-mentioned Suit No. 92 of 1934 was withdrawn later on by Nathaji Maruti, the alleged adopted boy, with permission to file a fresh suit on the same cause of action. Subsequently, Nathaji Maruti filed another Suit -No 125 of 1935 in which he asked for a declaration that he was the adopted son of Maruti Abajirao and that he had been adopted by Bai Babai. He also asked for accounts of the properties and for recovering possession thereof from Malojirao and Rautimal.

It is important to bear in mind that this suit also was withdrawn in March 1939 by Nathaji Maruti with permission to file a fresh suit. No other suit, however, was subsequently filed by Nathaji Maruti against the present plaintiff, Malojirao, to recover possession of Abajirao's properties from him.

At this stage, it may be noted that Nathaji Maruti had made an application, Ex. 121 under the B.A.D.R. Act to a Court at Wai against Gangaram for recovering a debt under a promissory-note, which was alleged to be due from the said Gangaram. The defendants rely upon this circumstance in support of their contention that Maruti Tukaram had become Nathaji Maruti by reason of his adoption by Bai Babai.

A use is made by the defendants of the circumstance that in the above mentioned application Ex. 121, the name Nathaji Maruti, and not the name Maruti Tukaram, was used by the maker of the application.

4. The plaintiff goes on to contend that in the year 1933-34, Bai Babai began to grumble and complain that the amount of maintenance which was given to her by him, was insufficient and that therefore he gave other properties, namely, properties at serial Nos. 3 to 24 also to her for maintenance. The defendants challenge this position. They contend that the properties at serial Nos. 3 to 24 were never given to Bai Babai by way of maintenance but that Bai Babai was in adverse possession thereof.

The annual income of these properties was in the vicinity of Rs. 200. Bai Babai died in the year 1947. Thereafter one Shanker Maruti made an application on 23-7-1947 alleging that Bai Babai had died intestate and that therefore the State should take possession of the properties of Abajirao, namely, the properties which are mentioned in this suit at serial Nos. 1 to 24 and a Wada at Hingangaon. Maruti Tukaram, the husband of defendant 1, died on 8-7-1948. He died in a hospital in Bombay.

On 26-1-1949, the present defendant 1 adopted defendant 2 as a son to her deceased husband. In that adoption-deed, the name of defendant 1's deceased husband was mentioned as Nathaji Maruti. In the present suit also defendant 1 has called herself the wife of Nathaji Maruti. On 23-1-1950 the plaintiff asked for permission of the District Court at Satara to file the present suit. The permission was granted to him on 24-1-1950-and the present suit was. filed by him on 18-4-1950.

5. As I have mentioned above, this suit has been resisted by the defendants upon the contentions that the plaintiff is not the validly adopted son of Abajirao, that the husband of defendant 1 was validly adopted by Bai Babai on 25-10-1934, that defendant 2 was adopted by defendant 1 as a son to her deceased husband on 26-1-1949, that the suit properties were in possession of Bai Babai as owner, that in any case she had become the owner by adverse possession, that these properties were never given to Bai Babai by way of maintenance and that in these circumstances defendant 2 is exclusively entitled, in any event, to the properties at serial Nos. 3 to 24.

6. It is clear that the decision of this appeal rests upon the validity or otherwise of the alleged adoption of Maruti Tukaram, the husband of defendant 1, by Bai Babai the widow of Maruti Abajirao. To prove this adoption and the validity thereof,, the

defendants have examined a number of witnesses, namely, defendant 1 Tarabai herself, Gangabai Narayan, Raghunath Bhausahb, Bapu Bavanak, Shankar Govind, Dhondiram Govinda, Gopal Pandurang, Tukaram Bala, Umar Bala, Shivram Krishna and Shripad Vaman.

The substance of the evidence of these witnesses is that Maruti Tukaram of Khanapur was adopted by Bai Babai of Hingangaon in 1934, that for the purpose of making this adoption Bai Babai had taken 50 or 60 persons from Hingangaon to Khanapur, that the adoption was made at Khanapur in the presence of about 200 persons, that a Hom was performed at the time of adoption, that a group photograph was taken on that occasion, that Tukaram, the natural father of the boy Maruti, had given him in adoption to Bai Babai, that the said Tukaram was present amongst the group of people who were photographed on that occasion, that Bai Babai had taken the boy Maruti Tukaram in adoption by putting him on her lap and putting sugar in his mouth, that after the adoption, Bai Babai and several persons had gone to Wai where the adoption-deed was written, executed and registered, etc.

Now it is elementary that what matters is the quality of evidence and not the mere volume or quantity of it. The onus to prove the adoption of Maruti Tukaram by Bai Babai is on the defendants and that onus must be strictly discharged. Unless the evidence led by the defendants satisfied the conscience of the Court that the boy Maruti was given away in adoption by his father Tukaram, the case of his adoption as set up by the defendant must fail.

Admittedly the boy Maruti was not given away in adoption by his natural mother Bai Saraswati, she was not even present at the alleged ceremony. She was not present in the group photograph, which was taken after the alleged adoption. There is no dispute regarding these facts, namely, the fact that the natural mother of the boy Maruti was not present at the alleged adoption and was not present in the group photograph. Therefore it is clear that Bai Saraswatibai, the mother of the boy Maruti, did not give him away in adoption.

It, therefore, becomes a matter of particular importance that the defendants must prove that the giving away of the boy Maruti in adoption was done by his father Tukaram. (After discussing the evidence, his Lordship proceeded:)

From all this evidence and the above mentioned circumstances, we come to the conclusion that neither Tukaram nor Saraswatibai, the natural parents of the boy Maruti, nor Bala nor Narayan nor Vishnu had participated in the ceremony of the alleged adoption. None of these persons who were very near relations of the boy is proved to have been present in the photograph which was taken after the alleged adoption.

That being so, the defendants have failed to discharge the onus which was strictly upon them, namely the onus to prove that the boy Maruti was given away in

adoption to Bai Babai by his natural father Tukaram. I have already pointed above that it is not the case even of the defendants that giving away of the boy was done by his mother.

The law of adoption is quite clear that it is either the natural father or the natural mother of the boy who can give him in adoption. None else can do so. That being so, the validity of the giving away of the boy Maruti in adoption to Bai Babai is not established by the defendants.

7. There are several other circumstances, which in our view are wholly incompatible with the defendants' contention that Maruti, the son of Tukaram, was given away in adoption by his father Tukaram to Bai Babai. (After discussing the evidence further, the judgment proceeded:) In view of what has been stated above, we come to the conclusion that the defendants have hopelessly failed to prove that the husband of defendant 1 was accepted by Bai Babai as a son to her deceased husband Maruti Abajirao.

We are of the view that Tukaram, the natural father of the boy, was not in a position to attend the alleged adoption ceremony on 25-10-1934 and had not in fact attended it and had not in fact given away his son in adoption. So far as the natural mother of the boy is concerned, she admittedly had not given the boy in adoption.

That being so, the valid giving of the boy in adoption is not proved. This must invalidate the adoption even if some stranger gave away the boy to Bai Babai. (After discussing the evidence further the judgment proceeded:)

I have already referred exhaustively to several circumstances convincingly pointing to a fact that Tukaram, the natural father of Maruti, could not give away his son in adoption to Bai Babai.

I have laid emphasis on the fact that Tukaram died on 9-11-1934 and was confined to bed for a month prior to that date and that, therefore, he could not have attended any adoption ceremony on 25-10-1934 and could not have given away his son in adoption. I have also pointed out that in the natural course of events, the adoption ceremony of the boy Maruti, if it had taken place at all, would have been attended not only by his natural father, but also by his natural mother, uncles and cousin.

The fact of the matter in this case was that the boy's mother Saraswatibai did not admittedly attend the alleged adoption ceremony, the boy's uncle Bala and Bala's son Vishnu were also admittedly absent, and so far as the other uncle Narayan is concerned, we have come to the conclusion, upon the evidence before us that in all probability he too did not attend the ceremony. We have also referred to several other circumstances which, in our view, are grossly incompatible with the alleged adoption of the boy Maruti Tukaram.

Thus, the cumulative effect of all the circumstances of the case, including the circumstances to which our attention is invited by Mr. Albal for the defendants, is that the defendants, upon whom there is the burden to prove the adoption of Maruti Tukaram by Bai Babai, have failed to satisfy the Court's conscience that Maruti Tukaram was given away in adoption by his father Tukaram to Bai Babai.

8. In view of our finding that the husband of defendant 1 is not shown to have been validly adopted by Bai Babai as a son to her deceased husband, it is not necessary to go into the question of the alleged adoption of defendant 2 by defendant 1.

If defendant 1 herself, as the wife of Nathaji Maruti, had no rights whatever in respect of the properties of Abajirao, she obviously could not pass on those rights to defendant 2 even if it be assumed that she did make an adoption of defendant 2. That being so, we consider it wholly unnecessary to examine the evidence on the point of the alleged adoption of defendant 2 by defendant 1.

9. Before proceeding further we may deal with and dispose of the contention which Mr. Albal pressed before us that the plaintiff's own adoption by Abajirao, which took place on 12-9-1913, was an invalid adoption.

In this connection, Mr. Albal drew our attention to an application which was made in the year 1894 by Nathaji Malojirao, in which Nathaji Malojirao alleged that his son Abajirao was an . idiot and lunatic and was therefore incapable of managing his estate and that, therefore, the District Court might ask the Collector in his capacity , as Court of Wards to manage the said estate (the estate belonging to Nathaji Malojirao).

Let it be assumed that in that year Abajirao was an idiot and not of sound mind. However, the material year is the year 1913 and the material date is 12-9-1913. Now, we know that in Msc. Appln. No. 89 of 1902, which was filed by Abajirao in the District Court at Satara, an inquiry was ordered by the Court in the matter of sanity or soundness of mind of Abajirao.

Abajirao was sent to the Civil Surgeon of Satara. He was kept under the Civil Surgeon's observation for several days and the conclusion to which the Civil Surgeon arrived as to the state of the mind of Abajirao was that he was a person of sound mind. He only suffered from two defects (1) of inarticulate speech and (2) of shortness of hearing.

Besides these two defects no infirmity was found by the Civil Surgeon in respect of the health of Abajirao. So far as mental health of Abajirao was concerned, the Civil Surgeon opined that he was of sound mind. This was the opinion recorded by the Civil Surgeon in the year 1905, that is about ten years after the date upon which Abajirao's father Nathaji Malojirao had made an application in which he had alleged that Abajirao was an idiot and a lunatic.

There is nothing to show that between the year 1905 and 1913 the mental condition of Abajirao had deteriorated and that he had become a person of unsound mind. That being so, we cannot accept Mr. Albal's submission that Abajirao was incapable of making a valid adoption by reason of unsoundness of mind. In our view in September 1913 Abajirao was a person of sound mind and capable of making a valid adoption.

10. The next ground upon which Mr. Albal has challenged the validity of the plaintiff's adoption by Abajirao is that Abajirao was a leper and was therefore incompetent to make a valid adoption. In order to show that Abajirao was really a leper, our attention is invited to the adoption deed by which the plaintiff was adopted. This adoption deed was drawn up and executed on 22-9-1913.

In this document, there is a statement made by Abajirao himself, and the statement reads "recently since the last 6 or 7 years, I had contracted the disease of leprosy. For this reason there is no hope at all": He was obviously referring to the hope of marrying again, his previous five wives having already died. Then our attention is invited to the application which Abajirao made to the Collector of Satara on 6-9-1913.

In that application also Abajirao stated that his physical health had deteriorated, owing to the disease of leprosy and that he had become weak and was therefore not in a position to manage the moveable and Immovable properties left by his father. Then Mr. Albal has referred us to the endorsement made by the Sub-Registrar at the foot of the adoption deed regarding the plaintiff's adoption.

The Sub-Registrar's endorsement is in these words "Janrao alias Abasaheb Nathajirao Bhoite, the executant of the deed The aforesaid person is a leper". Upon this material Mr. Albal has submitted before us that at the material time, namely, in September 1913 Abajirao was suffering from leprosy and was therefore incapable of making a valid adoption.

11. Now, Mr. V.S. Desai appearing for the plaintiff appellant has invited our attention to the observations made by Mulla in his Principles of Hindu Law at page, 556, Edn. 11. The observations which the learned author has made are:

"Subject to the provision of any law for the time being in force, every male Hindu, who is of sound mind, & has attained the age of discretion, even though he may be a minor, may lawfully take a son in adoption, provided he has no son, grandson, or great grandson natural or adopted, living at the time of adoption".

Mr. Desai says that there is no injunction in the law of adoption that a person suffering from leprosy cannot make a valid adoption. On the other hand, Mr. Albal for the defendants has referred us to certain observations which Mayne has made in his Hindu Law and Usage at page 192, Edn. 11.

It would appear from these observations that leprosy is one of the infirmities which would disqualify a person from inheriting. The observations further say that a disqualified person cannot also make a valid adoption. The learned author has said

"Where a person is disqualified from inheriting by any personal disability such as impotence, lunacy, idiocy, leprosy, blindness only his aurasa son is entitled to his share".

Then the learned author has said "A disqualified person therefore cannot make a valid adoption". Belying upon these observations of Mayne, Mr. Albal has contended before us that as Abajirao was suffering from the disease of leprosy and was therefore disqualified from inheriting, he was also disqualified from making a valid adoption. Now, the law on the point was clearly laid down by their Lordships of the Privy Council in -- AIR 1924 125 (Privy Council) . The relevant observations are to be found in their Lordships' judgment at page 126. This is what their Lordships have observed:

"In these circumstances the law of the case is attacked by the appellant's counsel, but the law of the case may be stated to have been well settled in India for very many years, In the case of "Kayarohana Pathan v. Subbaraya Thevan AIR 1916 Mad 470 (B), a joint judgment of Benson and Sundara Ayyar JJ. concluded with the following proposition: "Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test".

It is clear, therefore, that the test which was accepted as the most satisfactory test as a result of consideration of the texts and the decision on the subject was that deformity and unfitness for social intercourse arising from the virulent & disgusting nature of the disease would prevent a person from making a valid adoption.

To a similar effect were the observations made by their Lordships of the Privy Council in another case, namely, -- "Mohunt Bhagaban Ramanuj Das v. Mohunt Raghunundun Ramanuj Das" 22 IA 94 (PC) (O). The pertinent observations are to be found at page 105 and the observations are in these words." "In order to disqualify from making an adoption the leprosy must be of a virulent form".

Now, in this particular case although it is clear, we think, upon the statement made by Abajirao himself in the adoption deed that he was suffering from leprosy at the time when he made the adoption of the plaintiff, there is not a title of evidence to suggest that the said leprosy was of a virulent type or was of disgusting nature or had resulted in the deformity of Abajirao to any degree or had rendered him unfit for social intercourse.

It is clear, indeed it is not disputed, that Abajirao had married as many as five times. This would show that people were giving their daughters to him in marriage, which would prove that he was not unfit for social intercourse. That being so according to

the well settled law, as Abajirao was not proved to have been suffering from leprosy of a virulent and disgusting nature and was not proved to have been unfit for social intercourse and was not proved to have been suffering from any organic deformity, he was not incapable of making a valid adoption. There is, therefore, no substance in Mr. Albal's cross objection that the plaintiff's adoption was invalid.

12. The only point, which now remains to be dealt with, is about the nature of Bai Babai's possession of the properties, more particularly properties at serial Nos. 3 to 24. The learned trial Judge, in the course of his judgment at pages 10 and 11, has given a number of reasons for coming to the conclusion that Bai Babai was in adverse possession of these properties.

Without going into a detailed examination of these reasons, it would be sufficient for us to observe that we are in agreement with the conclusion which the learned Judge has reached on this point. It is, therefore, clear that by reason of her adverse possession of these properties the properties have become stridhan of Bai Babai.

The only question is who are the stridhan heirs of Bai Babai. It is clear that Bai Babai who died in the year 1947 was 45 years old at the time of her death. She was therefore born in the year 1902. Her husband Maruti Abajirao died on 15-5 1912. Clearly therefore Bai Babai was only a girl of 10 years of age at the time when her husband died.

It would, therefore, be extremely improbable, indeed unnatural, that she would have given birth to any issue as a result of her contact with her husband. . However, no doubt on the point is left in view of the statement made by Bai Babai herself in the adoption deed, Ex. 187. She clearly stated Hi this document that she had no children either sons or daughters as a result of her marriage with her husband.

Clearly, therefore, once we come to the conclusion that the husband of defendant 1 is not proved to have been validly adopted by Bai Babai, the nearest stridhan heir of Bai Babai would be the present plaintiff by virtue of his valid adoption by Abajirao in September 1913.

13. In view of the reasons mentioned above, we come to the conclusion that the plaintiff is entitled to succeed wholly in his suit. Accordingly the judgment and decree under appeal are reversed and the plaintiff's suit is decreed.

A declaration to the effect that he is the owner of the suit properties will be granted to him. He is entitled to enjoy the income of the properties. He is also entitled to recover possession of the properties. The appeal is allowed.

14. The cross-objections fail and are rejected. The appellant's (plaintiff's) costs of the appeal will be borne by the defendants who will bear their own costs. The cross objections of the defendants are rejected with costs.

15. So far as the costs of the suit are concerned, the defendants will bear their own costs and also the costs of the plaintiff.

16. Appeal allowed.