Supreme Court of India
Madhusudan Das vs Smt. Narayani Bai And Others on 25 November, 1982
Equivalent citations: 1983 AIR 114, 1983 SCR (1) 851
Author: R Pathak
Bench: Pathak, R.S.

PETITIONER:
MADHUSUDAN DAS

Vs.

RESPONDENT:
SMT. NARAYANI BAI AND OTHERS

DATE OF JUDGMENT25/11/1982

BENCH:
PATHAK, R.S.
BENCH:
PATHAK, R.S.
TULZAPURKAR, V.D.

CITATION:
1983 AIR 114 1983 SCR (1) 851
1983 SCC (1) 35 1982 SCALE (2)1083

ACT:

Evidence-Weight to be given to finding of facts by trial court-Principle governing re-appraisal of oral evidence by appellate court.

Evidence-of witnesses holding position of relationship with parties - Court should examine its probative value with reference to entire mosaic of facts appearing on record.

Adoption - Fact of adoption to be proved in the same way as any other fact-Proof of physical act of giving and taking essential.

Joint Hindu Family-Partition-Notice to co-sharers of intention to separate essential.

HEADNOTE:

Jagannathdas and his wife Premwati had no children. Premwati suffered from tuberculosis and died on September 24, 1951. Thereafter Jagannathdas created a trust in respect of his estate which comprised of properties falling to his share in a family partition. The appellant filed a suit claiming that he had been adopted by Jagannathdas and Premwati as their son on September 24,1951, that the trust was void and that he was entitled to a half share in the estate. The trial court decreed the suit after finding that the appellant had in fact been adopted by Jagannathdas and

Premwati and that the adoption was valid.

On appeal by the trustees the High Court reversed the finding of tho trial court taking a different view of the evidence on record and dismissed the suit.

Allowing the appeal against the order of the High Court,

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HELD: In an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. The principle is one of practice and governs tho weight to be given to a finding of fact by the trial court.

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There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact.

[856-D-E; 857 B-C]

W.C. Macdonald v. Fred Latimer, A.I.R. 1929 P.C. 15; Watt v. Thomas, L.R. 1947 A.C. 484; Sara Veeraswami alias Sara Veerraju v Talluri Narayya (deceased) and Ors. A.I.R. 1949 P.C. 32; Sarju Parshad v. Raja Jwaleshwari Pratap Narain Singh and Ors., [1950] S.C.R. 781; and The Asiatic Steam Navigation Co. Ltd v. Sub-Lt. Arabinda Chakravarti, [1959] Supp. 1 S.C.R. 979 referred to.

In the instant case the question whether the appellant had in fact been adopted by Jagannathdas and Premwati had been determined by the trial court essentially on tho basis of oral testimony and reference had been made to a few documents only in supplementation of the oral evidence. The judgment of the trial court showed that it had analysed tho testimony of each material witness and in reaching its conclusions on the issues of fact it had relied in some instances upon its own appraisal of the manner in which the witnesses present before it had rendered their testimony and had weighed with great care the probative value of the evidence in the context of established fact and probability. But the High Court had, in disagreeing with the trial court, adopted an erroneous approach. It proceeded to judge the credibility of the witnesses mainly with reference to their

relationship with the parties without placing adequate weight on the nature of the evidence and the probability of its truth in the context of the surrounding circumstances. It rejected the testimony of the appellant's witnesses substantially on the ground that they were related to the appellant. This cannot, by itself constitute a sufficient basis for discrediting the witnesses. When a witness holds a position of relationship favouring the party producing him or of possible prejudice against' the contesting party, it is incumbent on the court to exercise appropriate caution when appraising his evidence and to examine its probative value with reference to the entire mosaic of facts appearing from the record. It is not open to the court to reject the evidence without anything more on the mere ground of relationship or favour of possible prejudice. The High Court should also have reminded itself that the witnesses had given their evidence before the trial court which had the opportunity of seeing their demeanour in the witness box and tho appreciation of their evidence by the trial court bad to be given due consideration in the light of that fact. [856C; 857-D; 861-E-G; 862-A-B]

(b) It is well settled that a person who seeks to displace the natural' succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption ar d its validity. It is also true that the evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. Nontheless the fact of adoption must be proved in tho same way as any other fact. [862-C-D]

A. Ragavamma and Anr. v. A. Chanchamma and Anr. A.I.R. 1964 S.C. 136 and. Kishori Lal v. Chaltibai [1959] Supp. 1 S.C.R. 698 referred to.

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(c) For a valid adoption the physical act of giving and taking is an essential requisite, a ceremony imperative in all adoptions, whatever the caste. And this requisite is satisfied in its essence only by the actual delivery and acceptance of the boy, even though there exists an expression of consent or an executed deed of adoption. In some cases to complete the adoption a "datta homam" has been considered necessary but in the case of the twice-born classes no such ceremony is needed if the adopted boy belongs to the same gotra as the adoptive father. [862-E; 863-B]

Shoshinath v Krishnasunder (1881) L.R. 7 I.A. 250; Lakshman Singh v Smt. Rupkanwar [1962] 1 S.C.R. 477 and Bal Gangadhar Tilak v. Shrinivas Pandit (1915) L.R. 42 I.A. 135 referred to.

In the instant case the High Court, relying on certain observations made by the Privy Council in Susroogan v Sabitra, held that the trial court had not scrutinised the evidence relating to the performance of the ceremony of

giving and talking and also did not have due regard to the probabilities and, on that basis, proceeded to reappraise the evidence in elaborate detail. When the Privy Council made those observations it had in mind cases where it was possible no doubt to make the acknowledgements, observe the ceremonies and give the notices adverted to by it. The High Court applied that standard to a case which was quite different. The issue here was whether the adoption had been effected in circumstances which plainly did not permit time for making acknowledgements, observing elaborate ceremonies and giving notices generally. According to both the parties, Premwati was seriously ill. The appellant's case is that she was so ill that she wanted to effect the adoption that very day. The respondents have alleged that she was already incapable of any activity. It is inconceivable that any elaborate arrangements for adoption could have been envisaged. In consequence, the High Court misdirected itself in applying a standard of proof to the evidence which the circumstances did not warrant. Even upon the approach adopted by the High Court its findings are vitiated by its failure to consider material evidence on record and by its reaching conclusions not sustainable in reason. The appellant has pleaded the custom of his community that the act of giving and taking suffices to effect a valid adoption and nothing has been shown to indicate that the further ceremony of 'datta homam' was necessary [863-D-H; 864-A-D; 864-F; 863-B]

Sutroogan v. Sabitra, (1866) 5 W.R. 109 referred to

(d) Separation from a Joint Hindu Family is effected by a clear and unequivocal intimation on the part of a member of the Family to his co-sharers of his desire to sever himself from the Family. A mere uncommunicated declaration amounts to no more than merely harbouring an intention to separate. A valid' partition requires notice to the co-sharers of the intention to separate. [869-C-E]

Girja Bai v. Sadashiv Dhundiraj, [1960] 43 I.A, 151; Bal Krishan and Ors. v. Ram Krishan and Ors., [1931] 58 I.A. 220; A Raghavamma and Anr. v. A Chenchamma and Anr A.I.R. 1964 S.C. 136; Puttrangamma and Ors., v. M.S. Ranganna and Ors. A.I.R. 1968 S.C. 1018 and Kalyani (dead) by L. Rs. v. Narayanan and Ors., A.I.R. 1980 S.C. 1173 referred to.

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In the instant case the trust deed contained a declaration on the part of Jagannathdas of his intention to separate in the event of the adoption deed being found valid by the court but no notice of such intention was given nor could be inferred from Jagannathdas to the appellant. Both the trial court and the High Court rightly rejected the contention that the declaration in the trust deed must R be regarded as effecting partition. [869-E; 869-A]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: CIVIL Appeal No. 2376 of 1969.

From the judgment and order dated the 30th September, 1963 of the Madhya Pradesh High Court in F.A. No. 82 of 1961.

B.D. Bal, Rameshwar Nath and N. Nagarathnam for the Appellant.

S.B.Bhasme, S.S.Khanduja for Respondents 1 (a) to 1(c). S.S. Khanduja, for Respondent No. 1 (d).

M.N. Phadke, M.M Sapre and J.S. Sinha for Respondents Nos. 3 to 9 and 11.

The Judgment of the Court was delivered by PATHAK, J. This is a plaintiff's appeal on a certificate granted under subclass (a) of clause (1) of Art. 133 of the Constitution by the High Court of Madhya Pradesh.

The appellant, who belongs to a prominent family of Jabalpur, instituted a suit, out of which the present appeal arises, for partition and separate possession and for rendition of accounts. The properties in suit comprise most of the estate falling to the share of one Seth Jagannathdas on a family partition of October 19, 1939.

The genealogy of the family may be set forth:

Diwan Bahadur Ballabhdas (died in 1925) Mannoolal Kanhaiyalal Jamnadas Mankuarbai (died in 1916) (died in 1923) (died in 1939) M. Narayanibai (Respondent) Narsinghdas (Respondent) Jagannathdas Balkrishandas Goverdhandas Madhu- Tribhu-

M.Premwati sudandas wandas (appellant)

Jagannathdas and his wife Premwati had no children. Premwati suffered from tuberculosis for several years and died on September 24, 1951. After her death Jagannathdas created a trust by a registered deed dated March 17, 1952 called the Seth Mannoolal Jagannathdas Hospital Trust in respect of most of his estate He reserved the right to revoke the trust, but subsequently by a further document dated July, 14, 1952 he relinquished that right. Ever since the inception of the trust the trustees have remained in possession of the estate.

The appellant filed the present suit on September 24, 1957 against Jagannathdas and the other trustees claiming that he had been adopted by Jagannathdas and Premwati as their son on September 24, 1951, that the trust was void and that he was entitled to half the estate. Jagannathdas died on October 7, 1957 during the pendency of the suit, and in consequence the appellant claimed a F 314th share of the estate, with the remaining 1/4th being conceded to Narayanibai the mother of Jagannathdas.

The suit was decreed by the trial court on September 27, 1961 and a preliminary decree was passed declaring the appellant entitled to the share claimed by him and to partition and separate possession of the properties. The trust was declared invalid and the trustees, in consequence, were declared trespassers and liable to render accounts to the appellant.

An appeal by the trustees was allowed by the High Court by its judgment and decree dated September 30, 1967 and the suit has been dismissed, Several issues were tried by the trial court and considered on appeal by the High Court, but the most crucial and decisive issue, and which constitutes the core of the controversy between the parties, is whether the appellant can be said to be the adopted son of Jagannathdas. The trial court found that the appellant was in fact adopted by Jagannathdas and Premwati on September 24, 1951 and that the adoption was valid. The High Court has reversed the finding, taking a different view altogether of the evidence on the record.

The question whether the appellant was in fact adopted by Jagannathdas and Premwati has been determined essentially on the basis of oral testimony, and reference has been made to a few documents only in supplementation of the oral evidence. At this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. In this connection, reference may usefully be made to W.C. Macdonald v. Fred Latimer(1) where the Privy Council laid down that when there is a direct conflict between the oral evidence of the parties, and there is no documentary evidence that clearly affirms one view or contradicts the other, and there is no sufficient balance of improbability to displace the trial court's findings as to the truth of the oral evidence, the appellate court can interfere only on very clear proof of mistake by the trial court In Watt v. Thomas(2) it was observed: "... it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." This was adverted to with approval by the Privy Council in Sara Veeraswami alias Sara Veerraju v. Talluri Narayya (deceased) and others(1) and found favour with this Court in Sarju Parshad v. Raja Jwaleshwari Pratap Narain Singh and Ors.(2). It seems to us that this approach should be placed in the forefront in considering whether the High Court proceeded correctly in the evaluation of the evidence before it when deciding to reverse the findings of the trial court. The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact. Our attention has been drawn by the respondents to The Asiatic Steam Navigation Co. Ltd. v. Sub. Lt. Arabindra Chakravarti(3) but nothing said therein detracts, in our opinion, from the validity of the proposition enunciated here.

The judgment of the trial court shows that it analysed the testimony of each material witness and in reaching its conclusions on the issues of fact it relied in some instances upon its own appraisal of the manner in which the witnesses present before it rendered their testimony and weighed with great care the probative value of the evidence in the context of established fact and probability. On the central issue whether the appellant had been adopted by Jagannathdas and Premwati it commenced logically with an examination of the circumstances in which an adoption could be envisaged. Jagannathdas and Premwati were without issue. The wife was suffering from tuberculosis for about eight to ten years without any possibility of improvement and her health was fast deteriorating. There was no hope that she would bear a child. Jagannathdas admittedly belonged to an old respected family steeped in tradition and orthodox belief. He was the owner of considerable property. It was natural that Jagannathdas and Premwati should conceive the need for adopting a son. Jagannathdas was on the evidence, a sickly man of weak mind and of weak Will and of little education, and in the administration of his affairs Mankuarbai, his father's sister, and Narsinghdas, his uncle s son, played a prominent role. Premwati was aware of her husband's limitations and handicaps and quite understandably was anxious that a son should be adopted. The husband and wife were devoted to each other, and all the circumstances point to the conclusion that if Premwati desired the adoption of a son Jagannathdas would readily go along with the idea. He would willingly agree to whatever she wanted. There is evidence that Mankuarbai, who lived with Jagannathdas, knew of Premwati's desire to adopt a son. The desire to adopt a son was known to others also, and they included Narsinghdas. For it was first decided to consider the adoption of his son Gopaldas There is clear evidence that the child spent six months to a year in the house of Jagannathdas spending the day with Premwati and sleeping during the night with Mankuarbai. For some reason, however, it was decided not to r adopt him. There is a suggestion in the evidence that his horoscope indicated an early death, but the trial court has not relied on this. The desire to adopt a son continued and it was in the circumstances only natural to consider one of the sons of Seth Jamnadas, the only other brother of the father of Jagannathdas The appellant, Madhusudandas, was then a boy studying in college and the choice alighted on him. The trial court relied on the evidence of, among others, Narayanibai, mother of Jagannathdas, in reaching this conclusion. It has also referred to material clearly showing that when Premwati went to Panchmarhi in the summer of 1951 and stayed there for about two months with Narayanibai it was decided to send for Madhusudandas and have him stay with them for some time in order to determine whether, by his deportment and behaviour and the manner of his living, he was a suitable boy for adoption. The trial court found that the appellant did go to Panchmarhi and stayed with Premwati for some days. The trial court has also analysed the testimony of witnesses deposing to the contrary, and has given good reason for discarding that testimony. It inclined to the view that the appellant had found favour with Jagannathdas and Premwati and that they decided to adopt him.

The next question considered by the trail court was whether the appellant was in fact adopted on September 24, 1951. Consider able evidence was led on both sides to show the physical and mental condition of Premwati on that day, it being the case of the appellant that she was in fit condition to effect the adoption while the case of the contesting respondents was that her condition was so serious that it forbade any such possibility. There is no doubt that her condition was not good, having suffered deterioration during the preceding four days. The appellant produced a number of witnesses to prove that as she had grown very weak she requested that the adoption take place that

very day and that she was able to participate in the ceremony of adoption. The contesting respondents on the other hand, led evidence to show that she had slipped into a ' cyanosed state" and was totally incapable of any physical and mental activity. The trial court devoted detailed attention to the issue and carefully sifted the evidence adduced in support of the allegation that Premwati was unable to speak and "completely cyanosed" on September 24, 1951, and after weighing it in the light of incontrovertible or admitted fact it found the allegation untrue. In the first place, it observed that the written statement filed by Narsinghdas did not describe her specifically as being "cyanosed '. It found that the evidence of Dr. Choubey, who deposed that Premwati was unable to respond, could not be believed, nor was it possible to rely on the nurse Rachel, whose name was not mentioned in the original list of fifty-six witnesses filed by Narsinghdas, and who stated that she had been told by Dr. Choubey that Premwati was in an unconscious state. The entire case set up in evidence was completely demolished by the undisputed fact that Premwati had indeed signed the adoption deed on September 24, 1951. Much capital was made by the contesting respondents of the fact that the appellant had not examined Gopmath Vaidya to establish the condition of Premwati's health and the fact of adoption on September 24, 1951, but the trial court, in the course of its judgment, has referred in some detail to the appellants efforts to have the evidence of that witness recorded. At the appellant's instance a commission had been issued at Hathras for the examination of Ramsarandas and Gopinath Vaidya. On June 22, 1960 both witnesses were present before the Commissioner at Hathras, but the Commissioner took an unexpectedly long time in examining Ramsarandas on that day, and on the next day, to which he had deferred the examination of Gopinath Vaidya, he left town suddenly to see his sick son. The appellant, the trial Court pointed out, sought to examine the witness on a subsequent date in court at Jabalpur, but the witness did not appear.

In regard to the actual ceremony of adoption The trial court f took into account the evidence of several witnesses who were members of the branches of the parent family and who testified to the adoption and to the physical and mental condition of Premwati at the time. The case of the appellant was supported by oral and documentary material evidencing that while he had attended college in the morning on that day he did not do so in the afternoon, thereby leading credence to the appellant's case that on coming to know from Premwati that she intended the adoption of the appellant that very day Sunderbai, the appellant's mother, sent for him at mid-day from his college.

The trial court then considered the matter of the execution of an adoption deed by Jagannathdas and Premwati as evidence of the adoption. It took into account the circumstances in which the document was considered necessary, its execution and attestation, and how it was at first entrusted to Seth Govinddas and then returned to Jagannathdas. It was not disputed that such a document was in fact signed by Jagannathdas and Premwati on September 24, 1951, and the trial court repelled the case of the respondents that Jagannathdas was compelled to sign it without and knowledge of its contents and that Premwati also did so in ignorance of what it set forth. The fact that Jagannathdas was aware of the nature of the document is fully established by his reference to it as an adoption deed when he wrote out the receipt given to Seth Govinddas in envidence of its return. The trial court also noted that Jagannathdas disowned the adoption and the document later only when the circumstance around him changed as his wife approached her end and the over-powering influence of Narsinghdas began to take hold over his will.

The adoption deed contains certain recitals which appear to militate against the appellant's case. It refers to ceremonies, such as the performance of a "havan", to which none of the appellant's witnesses have testified. The respondents contended from this that Do adoption had been effected at all. The trial court examined this apparent inconsistency and explained it with reference to the peculiar circumstances in which the document had been prepared.

On the fact of adoption the trial court found itself fortified by the contents of a letter dated August 21, 1957 written by Jagannathdas to his mother stating that he had accepted the appellant as his son. The original document had been returned to Jagannathdas and the trial court permitted a photograph of it to be exhibited in evidence. The signatures on the letters were proved to be those of Jagannathdas and the trial court found that it was not a fabricated document. The trial court also referred to the testimony of Narayanibai that her son Jagannathdas had desired that his last rites be performed by the appellant, and there is no dispute that the appellant did perform the rites.

There was a letter dated September 27, 1957 purporting to have been written by Jagannathdas to Narsinghdas indicating that Jagannathdas had taken exception to the appellant instituting the present suit and he desired that the suit be resisted vigorously in order to protect the trust. The trial court has commented that this letter was produced very late during the trial of the suit in September 1961, without any adequate reason for the delay, and it observed that the document was not free from suspicion.

In the result, the trial court held that the adoption of the appellant stood proved in fact.

On the validity of the adoption the trial court examined the law and found that legal requisites for a valid adoption in the case of the families of the appellant and Jagannathdas, who belonged to Rajasthan, did not extend to more than the ceremony of giving and taking, and that the ceremony of 'dattak homam" was not necessary to effectuate the adoption of the appellant. Accordingly, the trial court took the view that the adoption was valid in law.

The High Court disagreed with the trial court and held that the adoption had not been established. In doing so, it adopted an approach which, to our mind, is plainly erroneous. It proceeded to judge the credibility of the witnesses mainly with reference to their relationship with the parties without placing adequate weight on the nature of the evidence and the probability of its truth in the context of the surrounding circumstances. It rejected the testimony of the appellant's witnesses substantially on the ground that they were related to the appellant or out of favour with Narsinghdas. This consideration, in our opinion, cannot by itself constitute a sufficient basis for discrediting the witnesses. We think the proper rule to be that when a witness holds a position of relationship favouring the party producing him or of possible prejudice against the contesting party, it is incumbent on the court to exercise appropriate caution when appraising his evidence and to examine its probative value with reference to the entire mosaic of facts appearing from the record. It is not open to the court to reject the evidence without anything more on the mere ground of relationship or favour or possible prejudice. The judgment under appeal indicates that the High Court commenced with that mistaken approach, and we see its influence working throughout its appraisal of the testimony of the several witnesses. It is only logical that with its approach so

oriented even the most significant material adduced by the appellant should, in the eyes of the High Court, take on a negative hue. The High Court should also have reminded itself that these same witnesses had given their evidence before the trial court, which had the opportunity of seeing their demeanour in the witness box, and the appreciation of their evidence by the trial court should have been given due consideration in the light of that fact.

It is well settled that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and a its validity. A. Raghavamma and Anr. v. A. Chanchamma and Anr.(1) It is also true that the evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. Kishori Lal v. Chaltibai.(2) Nonetheless the fact of adoption must be proved in the same way as any other fact.

For a valid adoption, the physical act of giving and taking is an essential requisite, a ceremony imperative in all adoptions, whatever the caste. And this requisite is satisfied in its essence only by the actual delivery and acceptance of the boy, even though there exists an expression of consent or an executed deed of adoption. Shoshinath v. Krishnasunder.(3) In Lakshman Singh v. Smt. Rupkanwar,(4) this Court briefly stated the law. thus:

> "Under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it."

In some cases, to complete the adoption a "datta homam" has been considered necessary, but in the case of the twice-born classes no such ceremony is needed if the adopted boy belongs to the same gotra as the adoptive father. Bal Gangadhar Tilak v. Shriniwas Pandit.(1) In the present case, the appellant has pleaded the custom of his community that the act of giving and taking suffices to effect a valid adoption, and nothing has been shown to us to indicate that the further ceremony of 'datta homam" was necessary.

Apparently, for this reason the parties concentrated in the main before the High Court on the limited controversy whether in fact the ceremony of giving and taking had been performed. In the course of adjudicating on this controversy, the High Court referred to the observations of the Privy Council in Sutroogan v, Sabitra(2):

> "Although neither written acknowledgments, nor the performance of any religious ceremonial, are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notices given of the times when

> adoptions are to take place, in all families of distinction, as those of `Zamindars' opulent Brahmins, that wherever these have been omitted, it behoves this Court to regard with extreme suspicion the proof offered in support of an adoption. I would say, that in no case should the rights of wives and daughters be transferred to strangers, or more remote relatives, unless the proof of adoption, by which the transfer is effected, be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth."

and it proceeded to hold that the trial court had not scrutinised the evidence relating to the performance of the ceremony of giving and taking and did not have due regard to the probabilities. On that basis the High Court rested its justification for re-appraising the evidence in elaborate detail. Now, when the Privy Council made those observations it had in mind cases where it was possible no doubt to make the acknowledgements, observe the ceremonies and give the notices adverted to by it. It had in contemplation the usual kind of case where that was possible and where though possible it had not been done. The standard of proof required would then have been the standard laid down by the Privy Council. The High Court applied that standard to a case which was quite different. The issue here was whether the adoption has been effected in circumstances which plainly did not permit time for making acknowledgements, observing elaborate ceremonies and giving notices generally. According to both parties, Premwati was seriously a ill. The appellant's case is that she was so ill that she wanted to effect the adoption that very day. The respondents have alleged that she was already incapable of any activity. It is inconceivable that any elaborate arrangements for adoption could have been envisaged. In consequence, the High Court misdirected itself in applying a standard of proof to the evidence which the circumstances did not warrant. Its appreciation of the evidence is founded in that misdirection, leading to findings which are accordingly vitiated. On the contrary we find that the trial court examined the evidence relating to the actual adoption with great care and pointed out that as Jagannathdas had accepted Premwati's suggestion to have the adoption that very day and during her lifetime the issue of invitations to relations and friends, the observing of elaborate ceremonies and the taking of a photograph were out of the question and that only the bare essentials of the ceremony of giving and taking were possible.

Even upon the approach adopted by the High Court, we find its findings vitiated by its failure to consider material evidence on the record and its reaching conclusions not substainable in reason. We have already pointed out that the allegation that Premwati was unconscious and in a cyanosed state on September 24, 1951 is belied by her undisputed signature affixed on the adoption deed on that day. The High Court omitted to take this aspect of the case into account when it allowed the evidence of Dr. Choubey, the nurse Rachel and others to find favour with it. The High Court also failed to appreciate that in the application sent by Jagannathdas to the Deputy Commissioner and the District Superintendent of Police on September 27, 1951 Jagannathdas had stated that Premwati's illness took a serious turn at about 5 O'clock in the afternoon on September 24, 1951 and it was from that hour that her condition became progressively worse until she expired at about 9 O'clock the same evening. This document has been produced by the contesting respondents. It does not detract from the case of the appellant that Premwati's condition was not so precarious as to forbid her from participating in the ceremony of adoption at about 3 O'clock in the afternoon. On the contrary, had Premwati been unconscious and in a cyanosed state throughout the day, as alleged

by the contesting respondents, the statement made by Jagannathdas in his letter of September 27, 1951 would have been phrased differently.

Ramsarandas deposed that he saw Premwati in the morning of September 24, 1951 and she insisted on having the adoption that very day because although "there was still time for the date of adoption" her health was deteriorating. The High Court declined to believe Ramsarandas because there was no evidence that any date had been fixed earlier for the adoption. We think the more reasonable way of looking at it is that Premwati had intended to mean that although otherwise there was still time for fixing a date in the future for adoption the poor state of her health did not permit her waiting any longer and the adoption should take place that same day.

The High Court has discovered apparent discrepancies in the testimony of some of the witnesses produced by the appellant, but it seems to us that it has attempted to make too fine a point in regard to what those witnesses said or did not say. The High Court inferred that Sunderbai did not visit Premwati at mid-day on September 24, 1951 and this was based on the statement of Rattan Kumari that Sunderbai was not in Premwati's room nor in the adjoining verandah when Rattan Kumari visited Premwati between noon and 12-30 p.m. The High Court failed to note that this was about the time when Sunderbai had left Premwati to make arrangements for summoning the appellant from his college to come to the house. The High Court has also commented that it was not natural that Sunderbai should not have asked Premwati why her son was being called. The High Court in our opinion omitted to consider that it had been understood for quite some time' that Jagannathdas and Premwati would adopt the appellant and it was natural to expect that on knowing of Premwati's serious condition Sunderbai should visit Premwati and at her instance send for her son for the purpose of adoption. Further, we have no doubt in our mind in view of the oral and documentary evidence that the appellant attended college up to the lunch recess and left it thereafter. The High Court has rejected that material without good reason.

The High Court has taken the view that Jagannathdas was IR averse to adopting the appellant, and it has relied on the evidence of Motilal, a witness of the respondents. It is clear from the evidence that at first Gopaldas, the son of Narsinghdas was considered for adoption and thereafter the appellant was kept in view for that purpose. There can be absolutely no doubt That Premwati was anxious to adopt a son during her lifetime and was actively involved in finding a suitable boy for that purpose. It is impossible to believe that Jagannathdas, her husband, was not privy to all that was going on and was not in agreement with Premwati in what she intended. The evidence demonstrates that he was a loving and devoted husband and greatly concerned with the gratification of his wife's wishes. His attitude to the appellant's adoption changed only as Premwati's life ebbed away, and the influence of Narsinghdas, without any significant force to counter it, began to spread its pall over him. We must remember that the real possibility of the adoption of his son Gopaldas, at an earlier stage, must have greatly appealed to Narsinghdas as it would have extended his domain over the estate of Jagannathdas. When, however, that possibility died and it became evident that Jagannathdas and Premwati would adopt the appellant instead, his attitude towards the intended adoption would inevitably have been hostile. It must not be forgotten that he had. been intimately associated with the administration of the affairs of Jagannathdas and there is evidence that they met almost daily. In the circumstances, the decision of Jagannathdas and Premwati to abandon their

intention to adopt his son Gopaldas and to prefer the appellant must have hurt considerably. The events which took place on September 24, 1951 moved much too rapidly for him to have taken any effective counter-measures, and he could have been able to assert his will over Jagannathdas only after Premwati's restraining influence was removed from the scene. With a person of Jagannathdas's weak character and at a time when he was oppressed by his wife's death and bewildered by the confusion surrounding him, that would not have been difficult. Indeed, the pressure of Narsinghdas's influence began to manifest itself almost shortly after the adoption had taken place, and Premwati, who was aware of the injury which he could work on her husband's simple mind, insisted on the execution of an adoption deed while she was still alive in order to protect the adoption. That her misgivings were not unfounded is evident from the circumstance that shortly after the document had been entrusted to Seth Govinddas, Jagannathdas asked for its return.

The High Court has declined to accept the adoption also on the ground that the adoption deed mentioned the performance of a "havan" and other ceremonies when in fact there is no evidence whatever that those ceremonies were performed. It does appear that there is an inconsistency between the case of the appellant and some of the recitals in the adoption deed. The inconsistency has a been explained satisfactorily by the trial court. It is apparent that the document was prepared by the lawyer, Jamna Prasad Dubey, containing recitals usual in such a document, and Manmohandas who had entrusted him with the task could have given him only the briefest instructions in regard to its contents. Time was running out fast as Premwati's condition grew progressively worse, and when it was brought before her and read out it was too late to effect a change in some of the recitals, and consequently it was signed as it was by Jagannathdas and Premwati. The complaints made by Jagannathdas to the Deputy Commissioner and the District Superintendent of Police as well as the public notices published in the newspapers disclaiming execution of the adoption deed and the adoption are explicable only in the context of the overpowering influence of Narsinghdas. So also is the creation of the Trust in which Narsinghdas secured for himself the office of working trustee in respect of most of the properties. It is significant that the power of revocation reserved to himself by Jagannathdas was relinquished by him within a mere four months of the creation of the Trust. The entire conduct of Jagannathdas persisting thereafter can be ascribed to the position to which he had been persuaded, namely, one of active opposition to the appellant's claim of adoption. The attitude was tempered only later, when a a few weeks before his death he wrote to his mother that he had "owned" the appellant as his adopted son.

The High Court has referred to some instances where the appellant, inconsistently with his claim of adoption, continued to show himself as the son of Seth Jamnadas. There were the partition deed, the application for mutation of names in Naya Mahal, the Income-tax proceeding and other records, but clearly these are matters in respect of which the appellant plainly considered it judicious not to assert his title in proceedings which could only result in its summary determination but to prefer to wait and institute an appropriate suit for an authoritative declaration of his status. The determination to file the suit must have gathered impetus from the changing attitude of Jagannathdas in favour of the appellant and reflected in his letter dated August 21, 1957 addressed to his mother in which he clearly states his acceptance of the appellant as his son. It may be noted that this case of adoption was not conceived for the first time by the appellant when the suit was filed; the claim to that status had been asserted by an application made as early as October 20, 1951.

The High Court rejected the letter dated August 21, 1957 written by Jagannathdas to his mother accepting the appellant as his son. We are not impressed by the reasons given by it. It erred in assuming that the photostat copy was produced only at the stage of evidence. It was in fact filed by the appellant on February 15, 1958 before the written statements of the defendants were filed.

We have referred to some of the errors which vitiate the judgment of the High Court. It is not necessary, we think. to advert to all of them It is sufficient to say that there was no adequate ground for the High Court to interfere with the finding of the trial court. We are of opinion that the finding of the High Court that the appellant had not proved his adoption must be set aside and that of the trial court restored.

It is urged by the contesting respondents that in the event of the Court holding that the appellant is the adopted son of the Jagannathdas and Premwati he can be found entitled to a half share only in the properties. The submission is based on a recital in the trust deed executed by Jagannathdas that if the adoption deed "is declared valid by the highest court then, today, I express, by this writing, a strong and unequivocal intention to separate at once from the heir by the aforesaid alleged adoption deed and direct the trustees that in that event they shall get the property immediately partitioned and apply at least my half share in the property for fulfillment of the objects of the trust:" It is contended that the declaration contained in the trust deed must be regarded as effecting a partition whereby the share of Jagannathdas in the property stood separated from the share of the appellant and the former share must be treated as the subject of the trust. Both the trial court and the High Court rejected the contention. They held that a valid partition required notice to the co-sharer of the intention to separate, and no such notice was given nor could be inferred from Jagannathdas to the appellant. We are in agreement with the courts below. It was held by the Privy Council in Girja Bai v. Sadashiv Dhundiraj(1) and Bal Krishan and Ors. v. Bal Krishan and Ors.(2) that a separation is effected by a clear and unequivocal intimation on the part of one member of a Joint Hindu Family to his co- sharers of his desire to sever himself from the Joint Family. In A. Raghavamma and Anr. v. Chenchamma and Anr. (Supra), Puttrangamma and others v. M.S. Ranganna and Ors.(3) and Kalyani (dead) by L. Rs. v. Narayanan and Ors.(4) this Court held that there should be an intimation, indication or representation of such intention, and that this manifestation or declaration of intention should be to the knowledge of the persons affected because a mere uncommunicated declaration amounts to no more than merely harbouring an intention to separate. In the present case, there is no evidence whatever to show that the intention to separate was communicated by Jagannathdas to the appellant at any time when creating the trust. There are other grounds on which the appellant contends that the declaration of separation in the trust deed is wholly in effective, but we consider it unnecessary to consider them here.

It may be pointed out that the High Court also repelled the plea raised by the contesting respondents that pursuant to a compromise affected by Narayanibai in a suit filed by her against the trust it was not open to her to claim from the trust a one-fourth share in that estate. The High Court rightly pointed out that the question did not arise because she could not be regarded as having given up a right then which vested in her only on the death of Jagannathdas on October 7, 1957. On the question whether the suit was barred by limitation the High Court, in our opinion, also rightly concurred with the trial court in maintaining that it was not. No argument has been seriously raised

before us in respect of these two points.

In the result the appeal is allowed, the judgment and decree of the High Court are set aside and the judgment and decree of the trial court are restored. The appellant is entitled to his costs from the second and ninth respondents.

H.L.C. Appeal allowed.