

Mareyya Vs. Ramalakshmi

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Court : Chennai

Decided On : Aug-31-1920

Reported in : AIR1921Mad331; (1921)ILR44Mad260

Judge : Ayling and ;Odgers, JJ.

Appellant : Mareyya

Respondent : Ramalakshmi

Judgement :

1. The sole question for decision in this Appeal is whether it is proper to apply the doctrine of 'factum valet' to the adoption of an orphan. The facts are admitted. Appellant, Mareyya, was in fact adopted by Narasimhayya, respondent's husband, in 1910. Mareyya was at the time an orphan and was given in adoption by his elder brother. It is conceded on his behalf that the adoption was, strictly speaking, illegal--vide *Vaithilingam v. Natesa* I.L.R., (1914) Mad., 529. Can it be nevertheless upheld on the maxim 'factum valet quod non fieri debuit?'

2. In our opinion it cannot be so Upheld. The doctrine is one which must always be applied with great caution and we do not think we should be justified in applying it here. In *Subbaluvammal v. Ammakutti Ammal* (1864) 2 M.H C.R., 129 the learned Judges rejected the argument that the maxim of 'factum valet' could be applied to the adoption of an orphan, and set aside the decision of the Sadar Amin based on that doctrine. They also rejected the contention that an orphan could be validly

given in adoption by his elder brother. This is one of the cases quoted by the learned Judges in *Vaithilingam v. Natesa* I.L.R.,(1914) Mad., 529 in support of their decision, and we observe that in the latter case no attempt was made to apply the doctrine of 'factum valet', although the fact that the adoption was made more than thirty years before suit and had been treated as valid by the family was brought prominently to the notice of the Judges and is referred to in their judgment. *Bhagwat Pershad v. Murari Lall* (1910) 15 C.W.N., 524 is, no doubt, an exactly similar case to the present, in which the doctrine of 'factum valet' was applied to an adoption of an orphan given in adoption by his brother. The learned Judges say they apply it 'not without considerable hesitation' and lay stress on the lapse of 48 years after the adoption and on the grave injustice which would be done to the adopted son by destroying his civil status after it had been so long accepted. These considerations have no application to the case before us, where the adoption took place only six years before suit. *Chinna Gaundan v. Kumara Gaundan* (1862) 1 M.H.C.R., 54 is quoted as a case in which the doctrine was applied to the case of an adoption of an only son; and indeed it does seem to have largely induced the decision of the learned Judges, that the adoption of an only son, once made, was valid in law. But their Lordships of the Privy Council in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* I.L.R., (1899) 22 Mad., 398 , while endorsing the correctness of the decision in that case, certainly do not put it on the ground of 'factum valet'. On the contrary, they are at pains to point out at page 428 the inapplicability of such a doctrine and the conclusion they arrive at is that the adoption is not contrary to Hindu Law.

3. The true limits of the applicability of the doctrine of 'factum valet' as regards adoption are laid down by Westropp, C.J., in *Lakshmappa v. Ramava* (1875) 12 Bom. H.C.R., 364 thus:

To us it appears that its application must be limited to cases in which there is neither want of authority to give or to accept nor imperative interdiction of adoption.

4. The views of Westropp, C.J., in this connexion are expressly endorsed by the Privy Council in the last quoted case (page 423). See also Mahmood, J., in *Ganga*

Sahai v. Lekhraj Singh I.L.R.(1887) All., 253 :

The capacity to give, the capacity to take and the capacity to be the subject of adoption seem to me to be matters essential to the validity of the transaction, and, as such, beyond the province of the doctrine of factum valet.

5. As an instance of the proper application of the doctrine we may refer to *Wooma Dae v. Gokoolanund Dass* I.L.R.(1878) Calc., 587 . There, the maxim of 'factum valet' is relied on as supporting the view of their Lordships that the adoption which they were considering was legal and valid. But the only objection to the adoption there was that the rule of preference of a brother's son had been disregarded, and it was held that this view was not so imperative as to have the force of law. If that case be compared with the case before us in the light of the tests suggested by Westropp, C.J., and Mahmood, J. it will be seen how inapplicable the doctrine is to the case we have to deal with.

6. The only other case to which we shall refer is *Bashetiappa Bin Baslingappa v. Shivlingappa Bin Ballappa* (1873) 10 Bom. H.C.R., 268 . The learned Judges in that case, Westropp, C.J., and Nanashai Haridas, J., held that the adoption of an orphan, even when given by an older brother with the authority of parents given before their death, was invalid and they add the pithy remark that to allow such an adoption:

would leave it in the power of an older brother to thin the ranks of his Follow parceners by bestowing his younger brothers in adoption in a manner highly detrimental to the interests of the latter.

7. We must hold that the adoption of an orphan is not only contrary to Hindu Law but that the doctrine of 'factum, valet' cannot be invoked to support it.

8. The Second Appeal is therefore dismissed with costs.