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till her death, after which date it passed to defendant as her successor, and accordingly plaintiff's claim was barred by upwards of 12 years' adverse possession.

ODGERS, J.

It seems to me that this case together with *Usman Khan* v. *Dasanna*(1), lays down the correct principle to be followed, and that where it is found (as here) that the defendant has been in possession for over twelve years as owner and that that title can be ascribed to an arrangement come to between the parties in 1885—whether it be by invalid sale or otherwise—it is now too late to disturb it and the defendant must be taken to have acquired a good title by prescription. I should add that, in my opinion, *Muthukaruppan Samban* v. *Muthu Samban*(2), has now been overruled by the Privy Council in *Varada Pillai* v. *Jeevarathnammal*(3).

I agree in dismissing the Second Appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1920, August 20, 23 and 31.

MAREYYA (DEFENDANT), APPELLANT,

v.

RAMALAKSHMI (PLAINTIFF), RESPONDENT.*

Hindu Law—Adoption of an orphan—'Factum valet', applicability of.

The adoption of an orphan is invalid under the Hindu Law and the doctrine of '*factum valet*' cannot be invoked to validate it.

Lakshmappa v. *Ramana*, (1875) 12 Bom., H.C.R., 364, at 398 and *Ganga Sahai* v. *Lakhraj Singh*, (1887) I.L.R., 9 All., 253 at 297, followed.

SECOND APPEAL against the decree of G. GANGADHARA SOMAYAJULU, Temporary Subordinate Judge of Ellore, in Appeal No. 424 of 1917, filed against the decree of V. PURNAYYA, Additional District Munsif of Narasapur, in Original Suit No. 83 of 1916.

This was a suit brought by the respondent for a declaration that the alleged adoption of the appellant by the respondent's deceased husband was not true, and even if true was invalid in

(1) (1914) I.L.R., 37 Mad., 545. (2) (1914) 38 Mad., 1158.
(3) (1920) I.L.R., 43 Mad., 244 (P.C.).
* Second Appeal No. 16 of 1920.

law on the ground that the appellant was an orphan at the time of adoption, and for possession of certain properties. The defendant contended that the adoption was true and valid. The Lower Courts held that though the adoption did in fact take place, it was invalid in law as the appellant was an orphan at the time of the adoption and accordingly passed a decree as prayed for. The defendant preferred this Appeal.

V. Ramadoss for appellant.

P. Narayanamurti and *A. Satyanarayana* for respondent.

The Court delivered the following JUDGMENT :—

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*(1). Can it be nevertheless upheld on the maxim "*factum valet quod non fieri debuit*"?

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. *Ammalutti Ammal*(2) 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*(1) 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*(3) is, no doubt, an exactly similar case to

(1) (1914) I.L.R., 37 Mad., 529. (2) (1864) 2 M.H.C.R., 129.
(3) (1910) 15 C.W.N., 524.

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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*(1) 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 Ramalakshmamma*(2), 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 423 the inapplicability of such a doctrine and the conclusion they arrive at is that the adoption is not contrary to Hindu Law.

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*(3) 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."

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*(4):

"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*."

As an instance of the proper application of the doctrine we may refer to *Wooma Daee* v. *Gokoolanund Dass*(5). There, the

(1) (1862) 1 M.H.C.R., 54. (2) (1899) I.L.R., 22 Mad., 393 (P.C.).
(3) (1875) 12 Bom. H.C.R., 364 at 398.
(4) (1887) I.L.R., 9 All., 253 at 297.
(5) (1878) I.L.R., 3 Calc., 587 (P.C.).

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.

The only other case to which we shall refer is *Bashetiappa Bin Baslingappa* v. *Shivlingappa Bin Ballappa*(1). The learned Judges in that case, WESTROPP, C.J., and NANABHAI HARIDAS, J., held that the adoption of an orphan, even when given by an elder 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 elder brother to thin the ranks of his fellow parceners by bestowing his younger brothers in adoption in a manner highly detrimental to the interests of the latter."

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.

The Second Appeal is therefore dismissed with costs.

N.R.

(1) (1873) 10 Bom. H.C.R., 268.