LETTERS PATENT APPEAL.

Before Jenkins C.J., and N. R. Chatterjea J.

1915

May 3 ;
June 4.

MAHOMED BUKTH MAJUMDAR

v.

DEWAN AJMAN REJA.*

Wakf, validity of—Deference due to previous decision of High Court as authority—Res judicata—Mussalman Wakf Validating Act (VI of 1913), title, preamble and s. 3, whether retrospective or prospective only —Privy Council decisions and pronouncements on Indian Legislature.

Where there had been a previous adjudication by the High Court on the invalidity of a certain *wakf* based on legal grounds, (in a subsequent suit between the same parties):—

Held, that (*i*) ordinarily that Court should feel bound, not on the principle of *res judicata* but out of the deference which was due to a previous decision of the High Court, to follow that authority ; and (*ii*) that the previous conclusive decision had not been affected by the remedial operation of the Mussalman Wakf Validating Act of 1913, which was not retrospective in effect but prospective only.

Rahimunissa Bibi v. *Shaikh Manik Jan* (1) approved.

It is doubtful whether the Governor-General in Council would make a legislative pronouncement that the repeated decisions of the Privy Council were erroneous, though from its knowledge of the requirements of the country the Legislature may think that in future the law should be otherwise administered.

APPEAL by Mahomed Bukth Majumdar, the defendant No. 1.

This appeal was filed under clause 15 of the Letters

* Letters Patent Appeal No. 48 of 1914, in Appeal from Appellate Decree No. 2242 of 1911, against the decree of F. J. Jeffries, District Judge of Sylhet, dated May 25, 1911.

(1) (1914) 19 C. W. N. 76.

Patent against the judgment of Teunon J., dated 5th January 1914, which was as follows:—

"In the case out of which this appeal arises the plaintiffs as heirs to one Johura Khatun claimed a certain share in certain lands, originally the property of Johura Khatun's father.

The defence was that by a deed dated 31st December 1869, the father of Johura Khatun, and father-in-law of defendant No. 1, one Dewan Nasarat Raja Saheb, had made the properties *wakf* and that by an *ekrarnama* dated 17th Jaisth 1307 (May 1900) Johura Khatun had acknowledged the validity of the *wakf* and of a *solenamah* or compromise made between the Defendant No. 1 and his mother-in-law in a certain suit on the 7th Baisakh, 1306, and by so doing and by accepting from the defendant the allowance mentioned in the *wakfnama* Johura Khatun and her heirs were estopped from questioning its validity.

The plaintiff put the defendant to proof of his statements and further asserted that in suit No. 425 of 1901 the alleged *wakfnama* had been held by the Court to be invalid and that the question was therefore *res judicata*.

Plaintiff's suit having been decreed in both the Courts below defendant No. 1 now appeals.

His contentions before me are (*i*) that the validity of the *wakf* is not in fact *res judicata* as between the parties to the present suit; (*ii*) that the *wakf* should have been held to be a valid *wakf*, and (*iii*) that he should have been given a further opportunity of producing evidence, that is to say of examining himself in support of the alleged *solenamah* and *ekrarnama*.

It is admitted that in suit No. 425 of 1901 the *wakf* was held to be invalid, but in that case plaintiff sued as a creditor or representative of the wife of the original owner while he is now suing as an heir of the daughter. If the decision had been in favour of the validity of the *wakf* a fresh suit would have been open to the daughter and her heirs, and it cannot therefore be contended that in the present suit it is not open to the defendant to reagitate the question.

But in fact no evidence of the execution of the alleged *wakfnama* has been given and the document itself has been removed from the record by the appellant and is not produced at the hearing of this appeal. It is therefore impossible for me to say that it has been proved or is valid.

With regard to the third and last contention, it may be observed that on the 20th September 1910 the suit was peremptorily fixed for final hearing on the 7th November. On the 5th November the defendant appellant applied for a further adjournment and for his examination on commission and filed with the application a certificate from an Indian medical practitioner dated 31st October to the effect that he had been treating the

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defendant for "chronic rheumatic affections." Now from the order sheet it appears that on the 22nd August a prior application by the defendant for his examination on commission had been opposed by the plaintiff and was very properly rejected. Under the circumstances, I cannot hold that the second application not made before the 5th November though supported by a certificate dated 31st October was improperly rejected by the Courts below.

In the result this appeal fails and is dismissed with costs."

[This Letters Patent Appeal was heard by the High Court on the 3rd May 1915 when the respondents' vakil, Babu Braja Lal Chuckerburty, desired the Court to note that he did not appear for want of instructions, and after argument the appellants' vakil asked for one month's time to produce the previous decision of the High Court regarding the invalidity of the *wakf* which he did on the 4th June 1915.]

Babu Shib Chandra Palit (with him *Babu Birendra Chandra Das*), for the appellant. This suit is one for recovery of possession of land. Both Courts decided on the question of *res judicata*. The question was whether the lands formed the subject of a valid *wakf*. The case should have been sent back for proof of its genuineness. I did not plead *res judicata* (on 4th June 1915). In *Abul Fata's Case* (1), the Privy Council held that *wakf* was invalid on the ground of smallness and remoteness of the charitable bequest.

[N. R. CHATTERJEA J. But now an Act has been passed.]

Yes. The Mussalman Wakf Validating Act (VI of 1913). Retrospective effect has been given by this Act, which may affect vested rights. The first paragraph or section lends support to my contention that the effect is retrospective.

In *Rahimunissa Bibi* v. *Shaikh Manik Jan* (2),

(1) (1894) I. L. R. 22 Calc. 619; L. R. 22 I. A. 76.

(2) (1894) 19 C. W. N. 76.

Chaudhuri J., sitting on the Original Side, says this Wakf Act has no retrospective effect. I think he is not right.

[JENKINS C.J. It is a declaratory Act.]

The Privy Council decision in *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri* (1) was not mentioned in N. R. Chatterjea J.'s decision in *Buzlal Ghani Mia* v. *Adak Patari* (2).

[N. R. CHATTERJEA J. As the Privy Council has power to declare the nature of the law, all that the Legislature can say is what the law shall be in future.]

That is all I have got to say.

No one appeared for the respondent.

May 3.

JENKINS C.J. This is an appeal from a judgment of Mr. Justice Teunon by whom it has been held that the lower Courts have erroneously regarded certain judgments and decrees as constituting *res judicata*. At the same time he felt that he must affirm the decree of the lower Appellate Court on the ground that the *wakfnama* to which the decree related was not before him and that he had no means to form an opinion as to whether or not it was a void and invalid *wakf* as the Court had decided in a previous litigation.

We are in the same predicament. But there is another aspect of the case by which we are influenced and it is this:—From the judgment of the Munsif, it appears that the validity or invalidity of the *wakf* was a matter that came before the High Court and was a subject of adjudication in the High Court. We have been told in the course of the argument that the invalidity of the *wakf* was affirmed on legal grounds. The result then is that there is an adjudication by the High Court on the invalidity of the *wakf* which is

(1) (1894) I. L. R. 22 Calc. 619 : L. R. 22 I. A. 76.

(2) (1913) 17 C. W. N. 1018.

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based on legal grounds and ordinarily we should feel bound, not on the principle of *res judicata* but out of the deference which is due to a previous decision of the High Court, to follow that authority. Before finally deciding the case on that ground, we give the appellant before us an opportunity of producing the judgment of the High Court before us within a month from this date. If he fails to do so, this appeal will stand dismissed, but without any order as to costs.

[On the 4th of June 1915, the Court delivered its final judgment in the appeal].

June 4.

JENKINS C.J. We must affirm the judgment of Mr. Justice Teunon, though possibly, not precisely, on the ground which commended itself to him.

We are of opinion that the former adjudication as to the invalidity of the *wakf* is in the peculiar circumstances of this case conclusive for the purpose of the present litigation.

We have, however, been invited to take a different view of the matter out of deference to the Mussalman Wakf Validating Act of 1913. It has been contended that the remedial operation of that Act relates to the past as well as to the present and future, and that it was intended to be a declaration that the Privy Council pronouncement as to the law of *wakf* was erroneous. I do not wish to express any opinion as to the limits of the Indian Legislature's power. But I am doubtful whether the Governor-General in Council would make a legislative pronouncement that the repeated decisions of the Privy Council were erroneous, though from its knowledge of the requirements of the country the Legislature may think that in future the law should be otherwise administered. That I think is what has happened in this case. The preamble may perhaps give some colour to the

argument that the operation of the Act being retrospective as well as prospective. On the other hand the title of the Act seems, if anything, to have an opposite tendency. But both are of ambiguous value. At the same time the terms of section 3 clearly point to futurity. And this, I think, is most likely to have been in accordance with the intention of the Legislature on general consideration and also on the particular consideration to which I have alluded. This is my view of the Act and I hold, on the special circumstances of this case, that the previous conclusive decision on which the respondent is entitled to rely has not been affected by the provisions of the Act. I have the satisfaction of knowing that this is in accordance with the view of Mr. Justice Chaudhuri [*Rahimunissa Bibi* v. *Shaikh Manik Jan* (1)], which gives me greater confidence in the probability of this being the true view of the intention of the Legislature.

The result is that the appeal is dismissed. As there is no appearance on the part of the respondent, we dismiss the appeal without costs.

N. R. CHATTERJEA J. I agree.

G. S. *Appeal dismissed.*

(1) (1914) 19 C. W. N. 76.