

## APPELLATE CIVIL.

Before N. R. Chatterjea and Sheepshanks JJ.

1916

July 14.

ASHNA BIBI

v.

AWALJADI BIBI.\*

*Res Judicata*—Finding in claim case, if *res judicata* re other properties—  
Civil Procedure Code (Act V of 1908), O. XXI, r. 63, effect of—  
Wakf, validity of.

Properties A and B are included in an alleged wakf. The finding in a claim case regarding A that the wakf is a fraudulent transaction is not conclusive in a suit for declaration and possession regarding a share in B.

An order in a claim case is conclusive only as regards the particular property in dispute.

*Held*, further, that a wakf having been given effect to during the lifetime of the wakifs, is valid and irrevocable.

*Surnamoyi Dasi v. Ashutosh Goswami* (1), *Koyyana Chittemma v. Doosy Gavaramma* (2), *Ramu Aiyar v. A. L. Palaniappa Chetty* (3) distinguished.

*Radha Prasad Singh v. Lal Sahab Rai* (4), *Dinkar Ballal Chakradev v. Hari Shridhar Apte* (5) referred to.

APPEAL by the plaintiff, Ashna Bibi and others.

The facts necessary for the purposes of this report are shortly these. The plaintiff, Syed Hasil Prodhan, brought a suit for a declaration of his title to certain properties as the residuary heir of one Shane Ali. On the 10th June 1898 the said Shane Ali and his step-mother, the respondent No. 5 Joygunnessa Bibi, had

\* Appeal from original Decree, No. 442 of 1914, against the decree of Annada Kishore Datta Roy, Subordinate Judge of Jalpaiguri, dated June 5, 1914.

(1) (1900) I. L. R. 27 Calc. 714.      (3) (1910) I. L. R. 35 Mad. 35.

(2) (1905) I. L. R. 29 Mad. 225.      (4) (1890) I. L. R. 13 All. 53.

(5) (1889) I. L. R. 14 Bom. 206.

executed a wakfnamah with respect to certain properties in dispute. On the 28th April 1907 Shane Ali died without issue. The plaintiff alleged that by the terms of the wakfnamah Shane Ali was the first mutwalli and after his death his step-mother the respondent No. 5 was the next mutwalli; that the said wakfnamah was fraudulent and was never acted upon. After the death of Shane Ali some of the properties covered by the wakfnamah were attached in execution of decrees and sold by the creditors and in the claim case the wakfnamah was declared to be invalid as having been executed with a view to defraud creditors.

On the death of the plaintiff, Syed Hasil Proddhan, Ashna Bibi and others were substituted in his place.

The Court of first instance found the wakfnamah to be valid on the ground that effect was given to it during the lifetime of Shane Ali in respect of the provisions of the said wakfnamah and the property covered by it was in fact treated as dedicated property, and dismissed the suit.

From this decision the plaintiff appealed to the High Court.

*Mr. A. Rasul* (with him *Babu Jyotish Chandra Sarkar*), for the appellants, contended that the question of the validity or invalidity of the wakf having been decided in a previous case, could not be gone into now as it was *res judicata*. The order which held the wakf to be invalid was conclusive as no suit was brought under O. XXI. r. 63. According to Mahomedan Law the wakf was invalid, inasmuch as the intention of the wakifs was to enrich their family and defraud their creditors: see *Ramu Aiyar v. A. L. Palaniappa Chetty* (1), *Koyyana Chittemma*

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v. *Doosy Gavaramma* (1), *Radha Prasad Singh v. Lal Sahab Rai* (2) and *Surnamoyi Dasi v. Ashutosh Goswami* (3).

*Babu Jitendra Nath Roy*, for the respondent No. 5, contended that no issue between the plaintiff appellant and the present respondents having been raised in the claim case, the validity of the wakf could not be *res judicata*. Under O. XXI, r. 63, the order was conclusive only with respect to the particular right which was claimed to the property in dispute: see *Kedar Nath Chatterji v. Rakhal Das Chatterji* (4), *Dinkar Ballal Chakradev v. Hari Shridhar Apte* (5).

*Babu Nakuleswar Mukerjee*, for the respondent No. 6.

*Mr. A. Rasul*, in reply.

*Cur. adv. vult.*

N. R. CHATTERJEA AND SHEEPHANKS JJ. In the suit out of which this appeal arises plaintiff sued as the residuary heir of one Shane Ali to recover his share of certain property left by Shane Ali. He has been found to be the residuary heir of Shane Ali, and this finding has not been challenged on appeal.

The learned Subordinate Judge has dismissed his suit, holding that the property claimed is wakf property, and against this decision the plaintiff appeals.

His main ground of appeal is that the question of the validity of the wakf is *res judicata*, the alleged wakf having been decided in a claim case brought in the course of previous execution proceedings not to have been a *bonâ fide* document, but to have been put forward for the purpose of defeating the claims of creditors. The property which was the subject of the

(1) (1905) I. L. R. 29 Mad. 225.

(3) (1900) I. L. R. 27 Calc. 714.

(2) (1890) I. L. R. 13 All. 53.

(4) (1888) I. L. R. 15 Calc. 674.

(5) (1889) I. L. R. 14 Bom. 206.

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claim case is not the property which is now in suit. It is argued in support of the appeal that all the parties to the present suit having been made parties to the claim case, and the order in the claim case not having been challenged by a suit under O. XXI, rule 63, that order is conclusive and operates as *res judicata* in respect not only of the property to which it related, but of all the property included in the wakf. It is admitted on behalf of the appellant that there is no authority which directly supports this argument. Reference, however, is made to *Surnamoyi Dasi v. Ashutosh Goswami* (1), *Koyyana Chittemma v. Doosy Gavaramma* (2) and *Ramu Aiyar v. A. L. Palanippa Chetty* (3). None of these cases lend any support to the appellant's contention. The first of them decides that an order in a claim case is conclusive against persons whose title is derived from the claimant, whether their position is that of plaintiffs or defendants. The second merely decides the effect of payment of the decretal amount when made more than a year after the order rejecting the claim. The third decides that persons claiming through the parties in a claim case do not cease to be bound by the order, if they subsequently acquire other rights. There is nothing in any of these decisions which is of any assistance to the appellant. In the present case the appeal must fail, for the reasons that apart from any other considerations, an order in a claim case is conclusive only as regards the particular property in dispute: *Radha Prasad Singh v. Lal Sahab Rai* (4), *Dinkar Ballal Chakradev v. Hari Shridhar Apte* (5). In this case it is clear that the order in the claim case on the question of the validity of the wakf is not

(1) (1900) I. L. R. 27 Calc. 714.

(3) (1910) I. L. R. 35 Mad. 35.

(2) (1905) I. L. R. 29 Mad. 225.

(4) (1890) I. L. R. 13 All. 53.

(5) (1889) I. L. R. 14 Bom. 206.

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conclusive, the property in dispute not being that which was the subject of the claim case, and this ground of appeal fails.

It is next argued on behalf of the appellant that the alleged wakf was in fact invalid and fraudulent and was never acted upon. The evidence given by plaintiff's own witnesses is, as the learned Subordinate Judge points out, fatal to this contention. That evidence shows that effect was given in Shane Ali's lifetime to the provisions of the wakf and that the property was in fact treated as dedicated property. There is nothing to show that the transaction was a fraudulent one. The property covered by the wakf comprised only a portion of Shane Ali's property, and there is nothing to show that, as is suggested on behalf of the appellant, he was encumbered by debts and wished to defraud his creditors by means of a colourable wakf. This being so, the fact that the defendants since the death of Shane Ali have not carried out the provisions of the wakfnama, but have treated the property as their own, does not in any way affect the validity of the wakf. The wakf was created by a living man, and is therefore irrevocable.

This ground of appeal, therefore, also fails. The result is that the appeal is dismissed. Having regard to the circumstances of the case, we make no order as to costs.

L. R.

*Appeal dismissed.*