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plaintiff and was decreed. It is this decree which the present plaintiff seeks to set aside. In our opinion no such suit will lie. The certificate is conclusive as against the debtors under section 16 of the Succession Certificate Act. It can be revoked by the district court under section 18 of the same Act, and in our opinion no suit will lie to have the certificate and the decree set aside on the mere ground that the certificate was obtained by the use of false evidence. The appeal fails and is dismissed with costs.

Appeal dismissed.

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April, 30.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MUHAMMAD AMIR AND OTHERS (PLAINTIFFS) *v.* SUMITRA KUAR AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *section* 11—*Res judicata*—*Suit by plaintiffs as members of the Muhammadan community for a declaration that certain property was waqf—Previous similar suit by other plaintiffs*

Where a suit had been brought by two persons as members of the public for a declaration that certain property was waqf property, and it had been decided that the property in question was not waqf; *held* that this decision operated as *res judicata* in the case of any other similar suit which might be brought by other members of the public as such claiming a similar declaration.

THIS was a suit by nine plaintiffs who sued as members of the Muhammadan community and asked for a declaration that a certain mosque, mausoleum, the site of an *imambara*, together with a flower garden appertaining to the mosque and *imambara*, and a pacca well were waqf property, and also other reliefs. The main defence was that the suit was barred by the principle of *res judicata*, upon the following facts. In 1887 two persons had brought a suit in respect of certain property, including that now in suit, against the predecessors in title of the present defendants, who were auction purchasers in execution of a decree against one Abdullah Khan. In that suit it was expressly held that the plaintiffs had failed to prove that the property, or any part of it, was waqf. Both the courts below sustained this contention and dismissed the suit. The plaintiffs appealed to the High Court.

Mr. *B. E. O'Conor* (with him Mr. *D. R. Sawhny*, and Dr. *S. M. Sulaiman*), for the appellants.

*Second Appeal No. 496 of 1913 from a decree of Austin Kendall, District Judge of Cawnpore, dated the 28th of January, 1913, confirming a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 25th of November, 1912.

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MUHAMMAD AMIR v. SUMITRA KUAR.

Mr. *A. P. Dube*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiffs, who are nine members of the Muhammadan community, claimed a declaration that a certain mosque, mausoleum, the site of an *imambara*, together with a flower garden appertaining to the mosque and *imambara* and a pucca well built by Choti Bibi are waqf property, and that a western door which appertained to the waqf property might be re-opened, and other reliefs. Both the courts below have dismissed the suit as barred by the principle of *res judicata*. It appears that in the year 1887 two persons brought a suit in respect of certain property which included the property now in suit, against the predecessors in title of the present defendants, who were auction-purchasers in execution of a decree against one Abdullah Khan. In that suit it was expressly held that the plaintiffs had failed to prove that the property or any part thereof, was waqf. It is said, on behalf of the appellants, that the litigation in 1887 to which we have just referred, was not identical with the litigation in the present case. In the litigation of 1887 there were two plaintiffs. Both claimed as members of the Muhammadan community that the property was waqf, and one of them claimed that he was the *mutawalli*. It seems to us, therefore, that the very same question which is involved in the present suit was involved in the previous litigation.

It is next said that the plaintiffs in the previous litigation were litigating not as members of the public but in their private capacity. We think that this contention cannot be sustained. It was necessary for them in the first instance to establish as members of the public that a valid waqf had been created. There can be no question that they were litigating *bonâ fide*. We think, therefore, that, under the circumstances of the present case, the plaintiffs in the previous litigation were persons litigating *bonâ fide* in respect of a public right claimed in common for themselves and others and, therefore, the present plaintiffs must be deemed to be persons claiming under the plaintiffs in the previous litigation.

It is lastly contended that in the previous litigation the defendants admitted the right to worship. There is no doubt

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a statement in the judgement that the defendants had "no objection to the mosque being used." This seems to be a mere statement relating to the litigation then before the court. In the present case the plaintiffs expressly claim that the mausoleum and a certain specified plot are waqf property. In our opinion this question was finally decided in the previous litigation which held that it was not waqf. Under these circumstances we think that the decree of the court below was correct and ought to be affirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1914
May, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BISHESHAR DAYAL AND ANOTHER (PLAINTIFFS) *v.* JWALA PRASAD AND ANOTHER (DEFENDANTS)*

Act No. IX of 1872 (*Indian Contract Act*), *section* 30—*Wagering contract—Purchase of grain pit through agent—Intention of parties.*

The plaintiffs, who were commission agents, purchased for the defendants at their request a grain pit. The defendants, however, did not pay the price agreed upon and the plaintiffs resold the pit at a loss. They then sued the defendants to recover the loss on the resale of the pit and their commission. *Held* that, whether or not it might have been the intention of the parties that the grain pit should be resold as it was, the defendants making a profit or bearing a loss on the transaction, the transaction between the parties was not a wagering contract within the meaning of section 30 of the Contract Act. *Forget* v. *Ostigny* (1) and *Jagat Narain* v. *Sri Kishan Das* (2) followed.

THE facts of this case were as follows :—

The plaintiffs alleged that they purchased a grain pit full of grain for the defendants under their instructions. Under a custom prevailing at Hapur the defendants were bound to take delivery of the goods before a certain time, but that they failed to do so. Thereupon the plaintiffs under the terms of the contract sold the grain at a loss and brought the present suit for recovery of the difference in price and their commission. The defence was that the transaction was of a gambling nature. The court of first instance found that the grain pit as a matter of fact existed ; that it was purchased for the defendants under their instructions, but

* Second Appeal No. 140 of 1913 from a decree of D. I. Johnston, District Judge of Meerut, dated the 24th of September, 1912, reversing a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 1st of July, 1912.

(1) (1895) A. C., 318, (2) (1910) I. L. R., 33 All., 219.