

(1945) 09 AHC CK 0013

Allahabad High Court

Case No: None

Syed Mohammad Hasan

APPELLANT

Vs

Syed Mehdi Hasan and Another

RESPONDENT

Date of Decision: Sept. 27, 1945**Citation:** AIR 1946 All 399 : (1946) 16 AWR 53**Hon'ble Judges:** Malik, J**Bench:** Division Bench**Final Decision:** Dismissed

Judgement

Malik, J.

The facts giving rise to this appeal are given in detail in our judgment delivered to-day in the connected First Appeal No. 404 of 1941. [Syed Mohammad Hasan Vs. Syed Mohammad Hamid Hasan and Others](#). This appeal was filed, by Saiyed Mohammad Hasan, defendant 1, on the same allegations as in the other appeal that the wakif had no right to delegate his authority and Saiyed Mahmudul Hasan could not, therefore, execute any of the three wills all of which were invalid. Mr. Mushtaq Ahmad, learned Counsel for the appellant, made a statement before us that para. 18 of the wakf deed was perfectly valid and he did not wish to challenge the right of Mahmudul Hasan to execute his first will. On that submission this appeal must fail, and we dismiss it with costs.

2. Saiyed Mehdi Hasan, plaintiff respondent has filed a cross-objection against the part of his claim dismissed by the lower Court. Saiyed Mehdi Hasan relying on the third will of Mahmudul Hasan dated 5th May 1938, brought a suit claiming a sum of Bs. 5925 at the rate of Rs. 375 per mensem. The lower Court held that he was only entitled to get the allowance at the rate of Rs. 200 per mensem as fixed in the first will as he had not proved that during the period for which he had filed his claim there was any surplus income on which the third will could Operate. It is conceded that no evidence was given that there was any surplus income undisposed of by the first will dated 2nd February 1938. On the finding that the annuities fixed in the first

will could not be revoked or cancelled by the third will, it was necessary for the plaintiff, Mehdi Hasan, to prove that there was a surplus undisposed of under the first will before he could claim any relief on the basis of the third will. Saiyed Mehdi Hasan did not file an appeal against the decision in suit No. 22 of 1941 where he was a contesting defendant. The decision in that suit between Saiyed Mehdi Hasan and Saiyed Hamid Hasan that the first will was valid and the annuities fixed therein could not be revoked or cancelled became final and the finding in that case must now operate as *res judicata* between the parties. It is argued by Mr. Peare Lal Banerji that that finding may operate as *res judicata* between Saiyed Mehdi Hasan and Saiyed Hamid Hasan and Hamid Hasan may, therefore, be entitled to get maintenance allowance at the rate of Rupees 200 per mensem but it would not operate as *res judicata* between Mehdi Hasan and Mohammad Hasan and Mehdi Hasan would be entitled to get allowance at the rate of Rupees 875 from the mutwalli Mohammad Hasan and Hamid Hasan would, in his turn, be entitled to get maintenance allowance at the rate of Rs. 200 per mensem from Mohammad Hasan. It is true that a finding between a plaintiff and a defendant need not always be binding and operate as *res judicata* between co-defendants, but in the suit filed by Saiyed Hamid Hasan the question of the validity of the first will arose not only between the plaintiff, Hamid Hasan, and Mohammad Hasan, but it was a point in which all the defendants, who were the beneficiaries, were interested. They all took up attitudes which they considered to be most beneficial to them. The decision was, more or less, like a decision in a partition suit, The result of accepting Mr. Banerji's argument would lead to conflicting findings in the two suits, Nos. 22 of 1941 and 27 of 1941, for while in the suit of Hamid Hasan we would be bound to uphold, as no party has filed an effective appeal against the decree, the decision of the learned Civil Judge that the third will could only operate as against the surplus income, we would have to hold in suit No. 27 of 1941 that the third will was the only operative will and Saiyed Mehdi Hasan, plaintiff in this suit, was entitled to claim maintenance allowance as fixed by the third will. Having carefully considered the matter we have come to the conclusion that by reason of the failure of Saiyed Mehdi Hasan to appeal against the decree in Suit No. 22 of 1941 the findings in that suit must now be held to be binding on him and we must uphold the decision of the lower Court that Saiyed Mehdi Hasan is entitled to get maintenance at the rate of Rs. 200 per mensem unless he can prove that there is any surplus income on which the directions contained in the third will can operate. The cross-objection must also fail and is dismissed with costs.