

(1916) 07 CAL CK 0032

Calcutta High Court

Case No: Appeal from Original Decree No. 442 of 1914

Ashna Bibi

APPELLANT

Vs

Awaljadi Bibi

RESPONDENT

Date of Decision: July 14, 1916

Final Decision: Dismissed

Judgement

N.R. Chatterjea and Sheepshanks, JJ.

In the suit out of which this appeal arises Plaintiff sued as the residuary heir of one Slime 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.

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

3. 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 bond 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 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 Order 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 ILR (1900) Cal. 714, Koyyana Chittemma v. Doosy Gavaramma ILR (1905) Mad. 225 and Ramu Aiyar v. A.L. Palanippa Chetty ILR (1910) Mad. 35. 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* ILR (1890) All. 53 *Dinkar Ballal Chakradev v. Hari Shridhar Apte* ILR (1889) Bom. 206. In this case it is clear that the order in the claim case on the question of the validity of the wakf is not conclusive, the property in dispute not being that which was the subject of the claim case and this ground of appeal fails.

4. 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 (sic) 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.

5. 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.