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a mortgage, but really intended to convey the whole estate to the next heirs, there would have been some ground for holding that this is what was intended in 1868. But that is just what the defendants cannot now plead. They assert that they are trespassers. As such they must give way to the superior claims of the adopted son. Under this view the decision of the lower Courts must be reversed, and the plaintiff's claim to possession decreed, the claim as to profits being determined in execution.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Ránade and Mr. Justice Fulton.

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September 25.

MANCHHA'RA'M (ORIGINAL OPPONENT), APPELLANT, *v.* KA'LIDA'S AND ANOTHER (ORIGINAL APPLICANTS), RESPONDENTS.*

Res judicata—Estoppel—Fraud—Judgment obtained by fraud—Not conclusive inter partes—Succession Certificate Act (VII of 1889), *Sec.* 18, *Cls.* (*b*) *and* (*c*)—*Revocation of certificate.*

One Punja died in 1889, leaving behind him his daughter Máháli. Punja, it was alleged, had made a will appointing Kálidás and Kasandás as his executors. The executors applied for a certificate under the Succession Certificate Act VII of 1889 to recover a debt due to the deceased's estate from one Motirám. Máháli opposed this application, and claimed the certificate for herself by a separate application. The District Judge rejected Máháli's application, and issued a certificate to the executors on 14th September, 1892.

In the meantime, one Manchhárám obtained a decree against Máháli as legal representative of Punja, and in execution bought Punja's right, title and interest in the debt due from Motirám. On 12th September, 1892, Manchhárám applied for a certificate under Act VII of 1889 to recover this debt. The District Judge rejected this application. Manchhárám appealed to the High Court. To this appeal the executors were made parties at their own request. The High Court reversed the District Judge's order and remanded the case for disposal on the merits. Upon the remand the executors did not appear before the District Judge to contest Manchhárám's application, and the District Judge granted him a certificate. Thereupon he applied for revocation of the certificate previously granted to the executors; and the executors in their turn applied for a revocation of the certificate granted to him. The District Judge revoked Manchhárám's certificate on the ground that he had fraudulently concealed from the Court the previous grant of a certificate to the executors.

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Against this order Manchhárám appealed to the High Court, contending (*inter alia*) that the executors not having resisted his application for a certificate after the case had been remanded by the High Court, were estopped, on the principle of *res judicata*, from applying for a revocation of the certificate granted to him.

Held, that the executors were not estopped. The executors having applied to be made parties to the appeal proceedings, were bound to appear in the Court below, and their failure to do so disabled them from pleading objections, such as the collusive character of the decree and Máháli's want of title, but it did not operate as *res judicata*, especially when there was reason to suspect fraud on the part of Manchhárám. The order obtained by him could not have the effect of *res judicata*, unless the executors being called on to dispute it, had failed to do so.

A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud.

Held, also, that the District Judge had a right, under section 18, clauses (*b*) or (*e*), of Act VII of 1889, to revoke the certificate he had granted under a mistake of fact to Manchhárám.

APPEAL from the orders of J. B. Alcock, District Judge of Surat, in Miscellaneous Applications Nos. 24 and 27 of 1893 under Act VII of 1889.

The facts of the case are fully stated in the judgment of Ránade, J., and also in the head-note.

Govardhan M. Tripáthi for appellant Manchhárám:—The executors of Punja's will are estopped from applying to revoke Manchhárám's certificate under Act VII of 1889. They were parties to the proceedings which he had instituted to obtain a certificate. When the High Court remanded the case to the District Judge for disposal on the merits, it was their duty to appear, and resist the grant to him on every ground that was open to them. Not having done that, it is not open to them to take any objections now. The matter is *res judicata*—*Kishan Sahai* v. *Aladad Khán*[1]; *Ahmedbhoy Hubibbhoy* v. *Vulleebhoy Cásumbhoy*[2]; *Rámlál* v. *Chhab Náth*[3]; *Rám Kirpál* v. *Rup Kuári*[4].

Motilál M. Munshi for respondent:—The principle of *res judicata* does not apply to this case. And even if it did, it is always open to a party to a judicial proceeding to show that a judgment or order passed against him was obtained by fraud—*Ahmedbhoy*

(1) I. L. R., 14 All., 64.
(2) I. L. R., 6 Bom., 703.
(3) I. L. R., 12 All., 578.
(4) I. L. R., 6 All., 269.

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Hubibbhoy v. *Vulleebhoy*; *Sheik Budán* v. *Rámchandra*[1]. In the present case we contend that the appellant fraudulently concealed the fact of a previous grant of a certificate under Act VII of 1889 to the executors from the Court. If this fact had been brought to the notice of the Court, no certificate would have been issued to him.

RÁNADE, J.:—The certificate proceedings, in respect of which these appeals were preferred, have already come four times before this Court, and there have been three remands to the lower Court for final decision on the merits. The facts of the case are simple, though they have been somewhat complicated by reason of the various stages through which this litigation has passed since its first commencement in 1890.

One Punja Jagjiwan died on 15th November, 1889, leaving behind him his daughter, Máháli, as his heir. He, it is alleged, made a will on 4th November 1889, appointing Kálidás and Kasandás as his executors. These executors applied for a certificate under Act VII of 1889 to recover a debt of more than 1,000 Rs. due from one Motirám to Punja's estate. Máháli opposed this application, and claimed the certificate for herself in a separate application. The District Judge refused both applications. Thereupon the executors and Máháli both appealed to the High Court, which Court reversed the order of the District Judge, and remanded the case back for inquiry on the merits—*Bái Máháli* v. *Kálidás Fakirchand* [2].

The District Judge, in this remand inquiry, again rejected the executors' application, on the ground that they were bound to take out probate of the will. Bái Máháli thereupon withdrew her separate application. The executors again appealed, and the High Court reversed the order of the District Judge in January, 1892, and held that the executors were not bound to take out probate—*Kálidás Fakirchand* v. *Bái Máháli*[3]. The case was accordingly again remanded to the District Court.

In the third inquiry, the District Judge granted the executors' application for a certificate on 14th September, 1892, and at the

(1) I. L. R., 11 Bom., 537 at p. 540. (2) P. J. for 1891, p. 13.
(3) I. L. R., 16 Bom., p. 712.

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same time rejected Bái Máháli's application, which apparently had been renewed after the second remand. Bái Máháli appealed to the High Court, but her appeal was dismissed.

On 12th September, 1892, Manchhárám, claiming to be auction-purchaser of the right, title, and interest of Punja in the debt due from Motirám, applied in his own name for a certificate under Act VII of 1889. Manchhárám had bought Punja's right, title, and interest on 23rd August, 1892, in execution of a Small Cause Court decree obtained on 1st March, 1892, in Suit No. 163 of 1892 against Punja's estate represented by Bái Máháli. The executors were not parties to these proceedings, and their application to have the judgment-creditor's attachment raised was disallowed. Manchhárám's application to be made a party to the certificate proceedings, commenced by the executors in 1890, was also rejected by the District Judge, and Manchhárám did not appeal from that order of rejection.

The District Judge also refused Manchhárám's separate application of 12th September, 1892. Manchhárám thereupon appealed, and this Court reversed the District Judge's order, and remanded the case back a third time for disposal on the merits on 11th April, 1893—*Manchhárám* v. *Bái Máháli*[1]. In these appeal proceedings the executors were made parties at their own request.

When the case went back to the lower Court, Manchhárám's application was granted by the District Judge, and a certificate was ordered to be issued to Manchhárám for the recovery of the self-same debt for which the executors had obtained their own certificate on 14th September, 1892. The executors did not appear, and were not made parties in this Manchhárám's application in the District Court.

Finally, the executors applied to the District Judge for a revocation of Manchhárám's certificate, and Manchhárám made a separate application for a revocation of the executors' certificate. Both these applications were disposed of together by the District Judge, who revoked Manchhárám's certificate, on the ground

[1] P. J. for 1893, p. 174.

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that Manchhárám had concealed from the Court the fact of the previous grant of the certificate to the executors.

The present appeals have been preferred by Manchhárám from the order granting the executors' application for the revocation of his certificate, and the order rejecting his application for the revocation of the executors' certificate.

Mr. Motilál, for the executors, urged a preliminary objection that no appeal lay from an order refusing to revoke a certificate. He contended that section 19 only contemplated appeals from orders granting, or refusing, or revoking a certificate. We do not think there is much force in this objection. Manchhárám had clearly a right to appeal against the order revoking his certificate, and the order refusing to revoke the executors' certificate was in fact the same order with a different application. Moreover, the section clearly reserves the revisional powers of this Court as supplementing its appellate jurisdiction.

Mr. Goverdhanrám, pleader for Manchhárám, urged that as the executors had not, after asking to be made parties in the appeal proceedings in the High Court, taken care to appear as parties in the District Court after the third remand, they had no right to apply for a revocation of his certificate. He also contended that the principle of *res judicata* applied in such a case. He relied upon the ruling in *Kishan Sahai* v. *Aladad Khán*[1] in support of his first contention, and in respect of the extension of the principle of *res judicata*, he cited *Ahmedbhoy Hubibbhoy* v. *Vulleebhoy Cásumbhoy*[2], *Rám Lál* v. *Chháb Náth*[3], *Rám Kirpal* v. *Rup Kuari*[4]. There can be no doubt that the executors, having applied of their own accord to be made parties in the appeal proceedings, were bound to appear in the Court below, and that their failure to do so certainly shuts them out from pleading objections such as the collusive character of the decree, and Máháli's want of title to represent the estate, which might have been urged by them in the previous proceedings. While it is absolutely certain that if the executors had appeared in the District Court, that Court would not have granted the certificate

(1) I. L.R., 14 All., p. 64.
(2) I. L. R., 6 Bom., p. 703.
(3) I. L. R., 12 All., p. 578.
(4) *Ibid.* 6 All., p. 269.

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to Manchhárám, their failure to do so did not operate as a *res judicata*, especially where, as in this case, there was reason to suspect fraud on the part of Manchhárám. Section 13 is no doubt not exhaustive of the effects of the principle of *res judicata*, but under section 44 of the Evidence Act, as stated by Latham, J., a party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud—*Ahmedbhoy Hubibbhoy* v. *Vulleebhoy Cásumbhoy*(1). To the same effect is the qualification noticed by West, J., in *Sheik Budan* v. *Rámchandra*(2). The order obtained by Manchhárám could not possibly have the effect of *res judicata*, unless the executors, being called on to dispute its validity, had failed to do so. The two Allahabad decisions are clearly distinguished from the present case in that there was no allegation of fraud or intentional concealment. The Certificate Act in section 18 expressly empowers the District Court to revoke a certificate obtained fraudulently, or by the concealment of some material fact, or where, as in this case, an order had been previously made by a competent Court with respect to the same debts. The District Judge, therefore, had a right under these clauses (*b*) or (*c*) to revoke the certificate he had granted under a mistake of fact to Manchhárám. Such revocations of the Court's own motion have to be made in certain cases where a minor obtains a certificate on a representation that he is of full age, or an executor obtains probate of the will of a living person. As a general rule, however, the Court must be moved by the parties interested in the revocation to exercise its authority.

Quite apart from the complications introduced by the previous proceedings, there can be no doubt that when both Manchhárám and the executors sought to revoke each other's certificate, the lower Court exercised a wise discretion in revoking Manchhárám's certificate. It was granted long after the executors' certificate was granted. In fact, it was applied for only two days before the order granting the executors' certificate had been passed, and after Máháli had disputed their right for two years. Manchhárám knew the fact, for he applied to be made a party to

(1) I. L. R., 6 Bom., at p. 715. (2) I. L. R., 11 Bom., 537, at p. 540.

those proceedings. His application was rejected on 12th September, 1892, and he did not appeal from that order. Manchhárám claims only under an auction sale held in execution of an *ex-parte* decree against Máháli, whose contention in respect of the validity of her father's will had been negatived in both Courts. The judgment-creditor should, under the circumstances, have made the executors parties, as they, and not Máháli, represented the estate of the testator—*Shaik Musa* v. *Shaik Essa*(1); *Subbanna* v. *Venkatakrishnan*(2); *Baswantapa* v. *Ranu*(3). The record of the case shows that the executors, though they have not proved the will, have entered upon the charge of the estate, and have paid the funeral expenses of Punjábhai. Under all these circumstances, there can be no comparison between the title of the executors under the will, and of the auction-purchaser at a sale held under a decree against Máháli, who had failed to impeach the title of the executors. We accordingly confirm the orders of the District Judge; and reject both appeals. The appellant must bear his own costs and pay the costs of the executors.

FULTON, J.:—I fully concur with my learned colleague in thinking that these appeals must be dismissed. No sufficient reason was shown for the revocation of the certificate granted to the executors, as in the application made by Manchhárám it was not alleged that the will on which the executors based their title was invalid. As regards the revocation of Manchhárám's certificate, I think it was justified, because the certificate had been granted by the Court in ignorance of the fact that a previous one had been issued to the executors in respect of the same debt.

Order confirmed.

(1) I. L. R., 8 Bom., 241. (2) I. L. R., 11 Mad., 408.
(3) I. L. R., 9 Bom., 86.