

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Moosa Goolam Ariff and others v. Ebrahim
Goolam Ariff and another, from the Chief
Court of Lower Burma; delivered the 26th
June 1912.*

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ATKINSON.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY LORD MACNAGHTEN]

The Record in this case is more than ordinarily confused and the story is somewhat complicated. But for the purpose of this Appeal the material facts may be stated in a few sentences.

One, Hadjee Goolam Ariff, a wealthy Mahomedan merchant residing at Rangoon, being dissatisfied with the conduct of his two elder sons was minded to dispose of the bulk of his property for the benefit of his two junior wives and his five younger children, who were all minors at the time. With this object he applied for and obtained five separate orders under the Act of 1890 for the appointment of one and the same person as guardian of each of his minor children in order that the children by their guardian might accept the benefits which he intended to confer upon them. Being also desirous that his property should remain in one mass, intact and

undistributed, he procured the registration of a limited Company called the Goolam Ariff Estate Company, Limited. To this Company in return for shares there was transferred so much of his property as was retained by him together with the undivided shares in his estate which he had conveyed to his junior wives and his minor children.

Hadjee Goolam Ariff died on the 15th of May 1902, having made his will on the 19th of the previous month. It was proved by his eldest son, Ebrahim Goolam Ariff, one of the executors therein named on the 23rd of June 1902. From that time to the present there has been continuous and persistent litigation in which Ebrahim Goolam Ariff has endeavoured to set aside the disposition which his father made. In all these attempts Ebrahim Goolam Ariff failed except in his appeal in the present suit to the Chief Court of Lower Burma. On that appeal the order was made from which the present appeal to His Majesty has been brought.

The object of the present suit was to have it declared that the Goolam Ariff Estate Company, Limited, was not duly incorporated and that the property conveyed to the Company should be transferred "to the persons entitled to the same." The validity of the conveyances to the testator's junior wives and his minor children had been established in a suit, No. 146 of 1902, which ultimately came before this Board. But the validity of the incorporation of the Company had not been expressly determined.

The main grounds of defence to the present suit were—

- (1) that the certificate of incorporation of the Company was conclusive; and
- (2) that the question raised by the suit was "*res judicata*."

The questions framed to meet these points were both answered by the Court of Appeal in favour

of the Plaintiffs. In their Lordships' opinion both ought to have been answered in favour of the Defendants, who are the present Appellants.

In dealing with the first question their Lordships will assume that the conditions of registration prescribed by the Indian Companies Act were not duly complied with, that there were not seven subscribers to the memorandum of association, and that the Registrar of Companies ought not to have granted a certificate of incorporation. As a matter of fact a certificate of incorporation was granted. In their Lordships' opinion the certificate of incorporation is conclusive for all purposes.

The provisions of the Indian Companies Act of 1882 as regards the incorporation of companies are the same as those contained in the Imperial Act of 1862, except that it is specially provided in Section 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subscribers to the memorandum are competent to contract. Probably this provision was introduced because according to the Indian law the contract of an infant is not voidable but void and it would lead to endless confusion and expense if the Registrar were to take upon himself the duty of ascertaining whether the signatories to the memorandum were or were not of full age.

In England the question whether the Registrar's certificate is conclusive was decided so far back as 1867 by Lord Cairns sitting in the Court of Appeal. In Peel's case 2, Ch. 674, after signature and before registration a proposed memorandum of association had been altered without the authority of the subscribers so materially that in the words of Lord Cairns, "the alteration entirely neutralised and annihilated the original execution and signature of the document." The Company, however, was

registered and the Registrar gave his certificate of incorporation. It was objected that the memorandum of association had not been signed by seven or indeed by any subscribers and that the provisions of the Act had not been complied with. To that proposition Lord Cairns assented. But "the certificate of incorporation," he said "is not merely a *primâ facie* answer but a conclusive answer to such objection . . . When once the certificate of incorporation is given nothing is to be enquired into as to the regularity of the prior proceedings." That was a plain and direct decision on the point. The observations of Lord Chelmsford in *Oakes v. Turquand*, L.R. 2, E. and I. Appeals 325, are to the same effect. "I think," said his lordship, "that the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case that all previous requisites had been complied with." Undoubtedly Lord Cairns' decision has been cavilled at. For instance in *Re National Debenture Corporation*, 1891, 2 Chancery 505, a judge of first instance declined to treat a certificate of incorporation as conclusive which had been as was supposed subscribed by six persons only. On appeal, however, further evidence was admitted and it was found that the memorandum had in fact been subscribed by seven persons. On that ground the Court of Appeal reversed the decision appealed from. But unfortunately the learned Judges of Appeal made some observations to the effect that if the learned judge had been right as to the facts his decision in point of law would have been correct. These observations were mere dicta and besides the Court of Appeal could have had no jurisdiction to reverse Lord Cairns' decision. In their Lordships' opinion that decision is of unquestionable

authority untouched by any subsequent decision and unimpaired by any dictum in any Superior Court, although the legislature thought fit no doubt for good reasons to set the matter at rest by the Imperial Act of 1900, which put the words of Lord Cairns and Lord Chelmsford in a legislative enactment repeated in the Imperial Act of 1908.

Their Lordships are prepared to go further and to say that, in their opinion, even if there were no authority to guide their decision, the matter would seem to them to be absolutely plain on the words of the Act. The use of the word "otherwise" in Section 6 shows that the statutory condition that the memorandum of association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration, and apparently essential.

This view is sufficient to determine the case in favour of the Appellants, but inasmuch as the question of *res judicata* was very fully argued their Lordships do not think it right to abstain from dealing with it.

Section 13 of the Code of Civil Procedure of 1882 enacts that:—

"No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."

Then Explanation 2 of that Section declares that:—

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It was admitted by the learned Counsel for
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the Respondents that the alleged invalidity of the incorporation of the Goolam Ariff Estate Company, Limited, might have been made a ground of attack in the suit No. 146 of 1902, in which the validity of the dispositions made by Hadjee Goolam Ariff was attacked.

That it ought to have been made a ground of attack in that suit appears to their Lordships to be equally clear. All the facts on which the present suit is based were known to the Plaintiff and are stated at length in the proceedings of the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point. The case is plainly within the ruling of this Board in the case of *Kameswar Pershad v. Rajkumari Ruttunkoer*, 19 I.A. 234.

Their Lordships therefore think that the question raised in the present suit is *res judicata*, and on that ground as well, as on the ground that the certificate of incorporation is conclusive, their Lordships think that the suit fails and ought to be dismissed.

Their Lordships are therefore of opinion that the appeal ought to be allowed and the suit dismissed with costs both here and below, and their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

MOOSA GOOLAM ARIFF AND OTHERS

v.

EBRAHIM GOOLAM ARIFF AND
ANOTHER.

DELIVERED BY LORD MAGNAGHTEN.

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