

for presentation to the proper Court. Costs to abide the event of the appeal, if there is an appeal. If there is no appeal, then the appellant to pay the costs of this appeal.

1903.
MANEKSHAN
v.
DADABHAI.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Chandavarkar.

CHHAGANLAL HARIBHAI (ORIGINAL DEFENDANT 1), APPELLANT, v. DHONDU CHUDAMAN RANGRI AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 4), RESPONDENTS.*

1903.
July 8.

Practice—Procedure—Pending suit—Another suit based on the defence in the first suit—Specific Relief Act (I of 1877), section 39—Cancellation of instrument.

On the 16th March, 1899, the firm of Chhaganlal Haribhai brought Suit No. 96 of 1899 against Dhondu and Baba to recover a sum due on a bond passed by them to the firm. The defence pleaded that the bond was void, being passed for the balance due on wagering transactions. While this suit was pending, on the 13th June, 1899, Dhondu (one of the defendants in the suit) brought Suit No. 167 of 1899, to have the above-mentioned bond cancelled and delivered up to him, under section 39 of the Specific Relief Act (I of 1877). The Subordinate Judge decided both the suits together; he dismissed the first suit and allowed plaintiff's claim in the second.

Held, that the form of specific relief provided for by section 39 of the Specific Relief Act (I of 1877) was founded upon the administration of protective justice for fear (*quā timet*); and that there could be no fear, in the second suit, that the plaintiff would suffer serious injury if he did not bring the suit, for the plea which was the foundation of the second suit was raised by him in the defence to the previous suit.

APPEAL from the decision of D. G. Gharpure, First Class Subordinate Judge of Dhulia.

Suit for cancellation of a bond under section 39 of the Specific Relief Act (I of 1877).

On the 16th March, 1899, Bhagwandas Narotamdas, Maganlal Dullabhdas, and Shamchandra Rampratap, trading under the name of Chhaganlal Haribhai, filed Suit No. 96 of 1899 against

* Appeal No. 62 of 1901.

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Baba Chudaman and Dhondu Chudaman, to recover a sum of money with interest upon a bond passed in their favour by the defendants.

The defendants contended, *inter alia*, that the bond was passed for a balance due on wagering transactions, and that it was therefore void.

While this suit was pending, Dhondu Chudaman (defendant 2 in the first case) brought on the 13th June, 1899, Suit No. 167 of 1899 against Shamchandra Rampratap, Bhagwandas Narotamdas, Maganlal Dullabhdas and Baba Chudaman, to have the bond passed by him and Baba Chudaman to defendants 1, 2 and 3 (the plaintiffs in Suit No. 96 of 1899) cancelled under the provisions of section 39 of the Specific Relief Act (I of 1877).

The two suits were heard together.

Suit No. 96 of 1899 was decided on the 11th March, 1901. The Subordinate Judge, being of opinion that the transactions which resulted in the balance for which the bond was passed were wagering contracts, dismissed the plaintiffs' claim with costs.

In Suit No. 167 of 1899, the Subordinate Judge, on the same day, recorded the following order :—

“ The plaintiff sues to have cancelled a bond passed by him and defendant 4 to defendants 1, 2 and 3, and which forms the subject-matter of Regular Suit No. 96 of 1899 of this Court, between the same parties. The bond is declared in that suit to be unenforceable against plaintiff and defendant 4, and the parties have bound themselves by that decision (*vide* Exhibit 24). The claim is therefore allowed. Considering, however, that plaintiff has shown unnecessary haste in instituting this suit, which was superfluous in view of the said Regular Suit No. 96 of 1899 of this Court, I order that each party should bear his own costs.”

Defendant 1 in Suit No. 167 of 1899 appealed to the High Court.

Raikes (with him *N. M. Samarth*), for the appellant.

Scott (Advocate-General, with him *C. A. Rele*), for respondent 1.

V. V. Ranade, for respondent 2.

CANDY, J. :—How can you support the decree for a declaration given in your favour by the lower Court under section 39 of the Specific Relief Act (I of 1877) ?

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A. Rule.—In Suit No. 96 of 1899 we raised the defence that the bond was void, but that circumstance cannot deprive us of the right of suing for cancellation of the bond under section 39 of the Specific Relief Act (I of 1877). The relief sought in Suit No. 167 of 1899 was a separate relief and we were entitled to have the bond delivered up and cancelled. We could not have got this relief in Suit No. 96 of 1899. We had also reasonable apprehension in our mind that if the bond be left outstanding, it would cause us serious injury.

Another ground for bringing Suit No. 167 of 1899 was to save the bar of limitation. Article 91 of the second schedule to the Limitation Act (XV of 1877) provides that a suit for cancellation must be brought within three years.

N. M. Samarth, was not called upon.

CANDY, J.:—We think that the decree of the Subordinate Judge allowing the claim in the present suit cannot be supported. Suit No. 96 of 1899 was brought on the 16th March, 1899, by the firm of Chhaganlal Haribhai against Dhondu Chudaman and Baba Chudaman to recover on a bond passed to the firm by the defendants. The defence pleaded that the bond was void, being passed for the balance due on wagering transactions. On the 13th June, 1899, Dhondu Chudaman, one of the defendants in the prior suit, brought the present Suit No. 167 of 1899 to have the bond mentioned above cancelled and delivered up to him. He made his brother Baba a co-defendant in the second suit. The Subordinate Judge allowed the claim, but in so doing he failed to notice that the jurisdiction given to him under section 39 of the Specific Relief Act is dependent upon the exercise of his discretion. This form of specific relief is founded upon the administration of a protective justice for fear (*quia timet* to use the technical language of English law). In this case there can be no fear that the present plaintiff would suffer serious injury if he did not bring the present suit, for the plea which is the foundation of the present action was raised by him in the defence the previous suit, and was decided at the same time that this suit was decided. That decision is now under appeal in the Court of the District Judge, Khándesh. The Subordinate Judge

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considered that the plaintiff had shown unnecessary haste in instituting this suit, which, he said, was superfluous in view of the prior Suit No. 96 of 1899. In that view, with which we concur, he ought to have rejected the claim, and we now do so, reversing his decree.

Plaintiff must bear all costs, but those costs should only be costs incurred in Suit No. 167 of 1899 and not include any of the costs in Suit No. 96 of 1899.

Decree reversed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.J.E., Chief Justice, and Mr. Justice Batty.

1903.
 July 9.

GANESH VAMAN KULKARNI (ORIGINAL PLAINTIFF), APPELLANT, v.
 WAGHU VATAD RAJARAM (ORIGINAL DEFENDANT), RESPONDENT.*

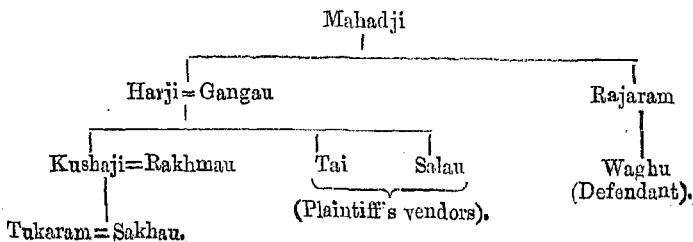
Hindu Law—Succession—Paternal aunt—Paternal great-grandfather's grandson.

Under the Hindu Law as prevailing in the Bombay Presidency, the grandson of the paternal great-grandfather of the propositus is entitled to succeed in preference to the paternal aunt.

SECOND appeal from the decision of Gangadhar V. Limaye, First Class Subordinate Judge of Poona, with Appellate Powers, confirming the decree of Ruttonji Mancherji, Subordinate Judge of Junnar.

Suit to recover possession of immoveable property and mesne profits.

The following genealogical table will simplify the pleadings :—



* Second Appeal No. 32 of 1903.