

and I declare that the plaintiff is entitled absolutely to two-thirds of the residue of the testator's estate and to a life interest in the remaining one-third, and that Sirinbai is absolutely entitled to such one-third. Costs of all parties (those of the trustees and the Advocate General taxed as between attorney and client) to come out of the residue of the testator's estate.

1901.

RAY
CHADUNBAI
c.
DADY NUS-
SERWANJI.

Attorneys for plaintiff and defendant 3—*Messrs. Craigie, Lynch and Owen.*

Attorneys for defendants 1 and 2—*Messrs. Ardeshir, Hormasji and Dinshaw.*

Attorneys for Advocate General—*Messrs. Little & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Starling.

HARIRAM MOHANJI, PLAINTIFF, v. LALBAI AND OTHERS,
DEFENDANTS.*

1902.

 April 1.

Civil Procedure Code (XIV of 1882), section 381—Order that plaintiff should give security for costs—Failure to comply with order—Dismissal of suit—Subsequently fresh suit brought on same cause of action—Dismissal of first suit no bar—Cause of action—First suit to recover property direct from defendants—Second suit to recover same property from same defendants, but alleging it to have been settled in trust for them and making trustees of settlements party defendants—Res judicata.

The plaintiff and one Naranji Virji were (it was alleged) cousins and the only members of a joint Hindu family. The plaintiff left Bombay and went to Cutch to avoid the plague, and in 1900, during his absence, Naranji died and his widows took possession of his estate. The plaintiff returned to Bombay, and as surviving member of the joint Hindu family sued (No. 124 of 1900) the widows for the property. They alleged that he was not a resident of British India, and obtained an order under section 380 of the Civil Procedure Code (XIV of 1882) directing that he should give security for costs or in default his suit should be dismissed. Being unable to comply with the order, his suit was dismissed under section 381 of the Code. Having learned for the first time during the course of that suit that, in his absence from Bombay, the deceased Naranji Virji had executed two deeds of settlement, by one of which he purported to settle some of the family property in charity and by the other to settle another portion on his

* Suit No. 493 of 1901.

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widows, the plaintiff subsequently brought this suit to recover the joint family property from the widows. He made the trustees of the two deeds of settlements defendants to the suit, and prayed for a declaration that Naranji had no right to settle any of the property and that the deeds should be cancelled. The first and second defendants (the widows) contended that the former suit was for the same relief, and that it having been dismissed under section 381 of the Civil Procedure Code (XIV of 1882) this suit was not maintainable.

Held, that the dismissal of a suit under section 381 of the Civil Procedure Code does not bar a fresh suit for the same cause of action.

Per Curiam :—If I had been of opinion that a fresh suit on the same subject-matter could not be brought, I should have held that in respect of all matters included in the deed of settlement it was not a suit on the same subject-matter.

Suit by plaintiff as surviving male member of a joint family to recover joint family property from the widows of a deceased member of the family.

The plaint stated that the plaintiff and one Naranji Virji were cousins and were the only members of a joint Hindu family. The properties in suit belonged to them as such.

Naranji Virji died on the 19th January, 1900, and the first and second defendants were his widows.

The plaintiff at the time of Naranji's death was in Cutch, having gone there three or four years previously to avoid the plague then raging in Bombay. In his absence, the first and second defendants (widows of Naranji) took possession of the estate.

The plaintiff thereupon, in the year 1900, filed a suit (No. 124 of 1900) to recover the estate from the widows, claiming to be entitled as the sole surviving member of the joint family. The widows filed a written statement in that suit, and the plaintiff then learned for the first time that during his (plaintiff's) absence in Cutch, Naranji Virji had executed two deeds of settlement, by one of which he purported to settle some of the family property in charity, and by the other he purported to settle another portion of the family property in trust for his two widows.

In that former suit (No. 124 of 1900) the defendant Lalbai, alleging that the plaintiff was not a resident in British India, obtained an order under section 380 of the Civil Procedure Code (XIV of 1882) that the plaintiff should furnish security for costs within one month, or, in default, his suit should be dismissed.

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The plaintiff thereupon, being too poor to furnish such security, petitioned for leave to continue the suit as a pauper; but before his petition could be heard, the month within which he was to give security had expired, and as he had failed to comply with the order, his suit was dismissed under section 381, although he applied for further time on the ground that his petition to sue as a pauper was then pending and had not been disposed of. The said petition came on for hearing on the 9th September, 1900, but as the suit had then already been dismissed, the plaintiff did not appear.

The plaintiff subsequently brought this second suit to recover the said joint family property from the widows (defendants 1 and 2). He also made the trustees of the two deeds of settlement defendants, and he further prayed for a declaration that Naranji had no right to settle any of the property, and that the deeds should be cancelled.

The first and second defendants (the widows) contended *inter alia* that the former suit (No. 124 of 1900) was for the same relief, and that it having been dismissed under section 381 of the Civil Procedure Code (XIV of 1882), this suit was not maintainable. This point was raised as a preliminary issue.

Raikes for plaintiff:—We contend that the dismissal of the former suit under section 381 does not bar this suit, which is not for the same cause of action. The trustees who are defendants here were not parties to the former suit. The property sued for is the same, but it is not from the same persons it is sought to be recovered. The former suit was to recover joint family property from the widows. This suit is to set aside a settlement.

Inverarity and *Lowndes* for defendants 1, 2, 6 and 7. They cited the Civil Procedure Code (XIV of 1882), sections 2, 373 and 381; *Rungrav v. Sidhi Mahomed*⁽¹⁾; *Williams v. Brown*.⁽²⁾ They also referred to *Administrator General of Bengal v. Prem Lall*.⁽³⁾

STARLING, J.:—In this case the first point to be decided is whether, if an order is made for a plaintiff to give security

(1) (1882) 6 Bom. 482 at p. 486.

(2) (1886) 8 All. 108.

(3) (1894) 21 Cal. 732.

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for costs under section 380 of the Civil Procedure Code and the suit is dismissed under section 381 as a consequence of his not having obeyed that order, he can file a fresh suit in respect of the same cause of action.

Section 381 provides that if security be not furnished the Court shall dismiss the suit, unless the plaintiff be permitted to withdraw therefrom under the provisions of section 373. If he applies to withdraw the suit under section 373, the Court may or may not give leave to bring a fresh suit for the same subject-matter. If it does not give leave, no fresh suit can be filed; but if no application is made under section 373, the Court is bound to dismiss the suit, unless it extends the time for giving security, and the section makes no direct provision as to the result of the dismissal upon a suit subsequently filed on the same subject-matter.

The section, however, provides that within the time limited by the Limitation Act for an application under section 103, the plaintiff may apply to have the dismissal set aside; but the clause providing for this application does not enact, as does section 103, that no fresh suit shall be filed.

Consequently, I am of opinion that as there is no provision prohibiting a fresh suit, it would be wrong for me to introduce such a prohibition; and I must find the preliminary issue in favour of the plaintiff and order the defendants to pay the costs of trying it.

Although Rule 290 of the High Court Rules does not apply to this suit, which was filed in 1901, yet its terms seem to indicate that the draftsman was of opinion that a fresh suit could be brought under the circumstances of this case, and he has introduced certain safeguards in order to prevent injustice to the defendants in the original suit.

If I had been of opinion that a fresh suit on the same subject-matter could not be brought, I should have held that in respect of all matters included in the deed of settlement it was not a suit on the same subject-matter.

Attorneys for plaintiff—*Messrs. Ardeshir, Hormazji, Dinshaw and Company.*

Attorneys for the defendants—*Messrs. Shamrao and Minocheher.*