1908.

HAJI BIBI v. H. H. SIR SULTAN MAHOMED KHAN.

by the Advocate-General and Mr. Padshah, as representing the other defendants who are opposing her.

For these reasons, it seems to me that I must rule that in this case the plaintiff and such of the defendants as support the plaintiff's case wholly or in part, must address the Court and call their evidence in the first place, and then, following the words of section 180 of the Code, the other party, namely the persons opposed to the plaintiff's case and that of the other defendants supporting her, must address the Court and call their evidence; and so the case must be proceeded with in a proper, legal and consistent manner.

Attorneys for the plaintiff:—*Messrs. Edgelow, Gulabchand, Wadia and Co.*

Attorneys for the defendant:—*Messrs. Payne and Co.* and *Messrs. Mehta and Dadachanji* and *Messrs. Pestonji, Rustim & Kolah* and *Messrs. Edgelow, Gulabchand, Wadia and Co.*

B. N. L.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908. *February* 25.

SONABAI, WIDOW, PLAINTIFF, *v.* TRIBHOWANDAS NAROTAMDAS MALVI AND OTHERS, DEFENDANTS, AND SONABAI, WIDOW, APPELLANT AND PLAINTIFF, *v.* TRIBHOWANDAS NAROTAMDAS MALVI, RESPONDENT AND DEFENDANT.*

Civil Procedure Code (Act XIV of 1882), section 380—Appeal lies from order under section 380, directing a woman to deposit security for costs—Such order is judgment under Letters Patent, clause 15—"Suit for money", what is.

An appeal lies against an order passed by a Judge sitting on the original side of the High Court requiring security from a woman under section 380, Civil Procedure Code. Such an order is a judgment within the meaning of clause 15 of the Letters Patent.

Seshagiri Row v. *Nawab Askar Jung Aftab Dowla*(1) followed.

* Suits Nos. 449 and 450, Appeals Nos. 1517, 1518.

(1) (1902) 26 Mad. 502.

Suits which are not exclusively for money, but which will result in a decree or money on the relief sought, come within the purview of section 380 of the Civil Procedure Code.

THESE were appeals against the orders made on Chamber summonses by Davar, J., directing the plaintiff to furnish security as required under section 380 of the Civil Procedure Code.

The plaintiff brought two suits against the defendant for a declaration *inter alia* that upon the death of Morarbhai's widow she was his reversionary heir and became entitled to his properties. The defendant took out Chamber summonses on the 18th October 1907, calling on the plaintiff to show cause "why she should not forthwith deposit with the Prothonotary of this Court, a sum of Rs. 3,000 by way of security for the first defendant's costs already incurred and likely to be incurred herein till the determination of the preliminary issue proposed to be tried."

Davar, J., ordered the plaintiff to deposit with the Prothonotary a sum of Rs. 1,000 as security for the first defendant's costs.

On appeal being filed against the orders the following judgment was written in compliance with Rule 281.

DAVAR, J.:—On the 18th October 1907, the first defendant obtained a summons in each of the above suits calling upon the plaintiff to show cause—

(1) Why discovery of the documents in the possession of the first defendant should not be postponed pending the trial of certain preliminary issues:

(2) Why certain preliminary issues should not be tried in the first instance: and

(3) Why the plaintiff should not be ordered to furnish security for the first defendant's costs.

The summons was in each case made absolute so far as the first two heads were concerned practically with the consent of all parties. The only discussion before me was as to the form of the issues and as to whether another issue proposed by the plaintiff should not also be ordered to be tried. That issue appeared to be unnecessary and I ordered the trial of two issues—directing the Prothonotary to set down the suit on some

1908.

SONABAI v. TRIBHOWANDAS.

board for the trial of those issues on some day that may appear to him convenient. Against this portion of the order there is no appeal.

The third requisition of the summons was resisted by the plaintiff on the ground that these suits were not suits "for money."

The words "suit for money" in the second paragraph of section 380 of the Civil Procedure Code have led to endless discussion before the Chamber Judge ever since the paragraph was added to the section by Act VI of 1888. I am glad the plaintiff has appealed against my order on this head for this will give an opportunity to the Appeal Court to make a definite and authoritative pronouncement as to what is a "suit for money."

To be a "suit for money" must the suit be wholly and exclusively for money? If in a suit the plaintiff—a woman—claims moneys as well as something else—is she liable to be called upon to furnish security for the defendant's costs under the second paragraph of section 380 of the Civil Procedure Code or is she exempt from its operation by reason of the suit being for some relief other than a mere money claim? Is it enough if the suit is in substance for money to bring it within the operation of section 380 of the Code? Different Chamber Judges in our Courts have taken different views and astute draftsmen of plaints in which women have been plaintiffs have, in order to save the plaintiffs from having to furnish security for costs, often introduced a quite unnecessary prayer either for some unimportant or useless declaration or for a formal prayer for administration of an estate if necessary. There is no authoritative decision of our Court on this subject and the result is that whenever the question arises it leads to interminable arguments at the Bar.

In *Degumbari Debi* v. *Aushootosh Banerjee*[1] Mr. Justice Wilson held that a suit to recover moneys and certain specified articles or the value thereof was a suit for money within the terms of paragraph 2 of s. 380 of the Civil Procedure Code. He says the words "suit for money" has a wider meaning than a

(1) (1890) I.L.R. 17 Cal. 610.

"suit for debts" and that in considering the question whether a suit is for money the Court "must look at the substance." The effect of this judgment I take to be this: If a suit is substantially one to recover moneys from the defendant, it would be a suit for money within the meaning of the section.

In *Bai Porebai* v. *Devji Meghji* (1) Sir Charles Farran, our late Chief Justice, follows the Calcutta case. This was a suit to recover ornaments and clothes. In the course of his judgment the Chief Justice says:—"It is not denied that the suit is, in substance, a suit for money. The ruling upon this point in *Degumbari Debi* v. *Aushootosh*(2) has usually been followed in this Court."

In the case of *Bomanji* v. *Nusserwanji*(3) Mr. Justice Russell has gone a step further. In this case the plaintiffs were a father and his minor daughter and the claim was for money damages and for the return of certain presents made to the defendant at his betrothal with the second plaintiff. The plaintiffs were ordered to furnish security although one of the plaintiffs was a male and the other a minor famale, both residents of Bombay, and the suit was partly for money and partly for recovery of presents made to the defendant.

In these two suits after a study of Exhibits B and B1 to the plaints, I came to the conclusion that these suits were substantially for money. It is true that in both these lists certain immoveable properties are mentioned, but it seems to me that the bulk of the property which the plaintiffs seek to recover in this suit consists of shares in mills, presses and other joint stock companies, Government Promissory Loan Notes, Municipal Debentures, deposits in companies and a very large quantity of ornaments and jewellery. The value of the immoveable properties was not mentioned to me, but it seemed to me looking at the list of moveable property that the value of the moveables must have been considerably in excess of the value of immoveable properties. If a claim for ornaments and clothes is substantially a claim for money, I can see no difference between ornaments and clothes on the one hand and liquid securities such as are

(1) (1898) 23 Bom. 100. (2) (1890) 17 Cal. 610.
(3) (1902) 27 Bom. 100.

1908.

SONABAI v. TRIBHOWANDAS.

mentioned in lists B and B1 on the other hand. Just as the defendants in the suits mentioned above would have had, in the event of plaintiffs establishing their claims, to pay the money value thereof in the event of the ornaments and clothes not being forthcoming as observed by Mr. Justice Wilson in *Degumbari Debi* v. *Aushootosh* (*supra*) the defendants in these suits—in the event of the plaintiff succeeding—would have to make good the value of the securities if the securities were not forthcoming and pay moneys.

The section of the Code does not say that the suit should be *wholly* for money or even *substantially* for money and the view I take is that if the suit is one in which the *chief or principal relief* asked is the recovery of money or the recovery of moveable property, which if not produced by the defendant he would have to pay its money value, the suit is one for money and falls within the purview of the second paragraph of the section 380 of the Code.

The only other question for my consideration was: Ought I to exercise the discretion vested in me and make the order asked for against the plaintiff. I have always been most averse to making orders against women for depositing security for the defendant's costs when I find that such an order would embarrass them and hamper them in the conduct of their cases. In the cases of poor women such an order amounts to a denial of justice to them. Unless the suit is on the face of it vexatious or is one which I feel is filed merely for the harassment of the defendant I do not make an order against a woman plaintiff for security for defendant's costs—when she says she is not in a position to give such security and I believe her statement. In a large number of cases where *prima facie* a woman plaintiff is entitled to some of the reliefs she claims and the order against her for costs does not appear to be necessary for the reasonable protection of the defendant, the order is usually refused.

In these cases the plaintiff never alleged in her affidavit that she was not in a position to furnish security—in fact I asked her counsel and he said that that was not a ground on which she asked to be relieved from the operation of the section.

In *Bidhatree Dassee* v. *Mully Lall Ghose* (1) Mr. Justice Sale was of opinion that the Courts ought not to interfere unless it was shown that the exercise of its powers was necessary for the reasonable protection of the defendant.

In the present cases I come to the conclusion that under the circumstances disclosed in the affidavits of the first defendant and the plaintiff, an order for security of costs in each of these cases was necessary for the reasonable protection of the first defendant. The property which the plaintiff seeks to recover from the defendant in these suits was the subject of very heavy litigation in 1904. She is a member of the family to which the first defendant belongs. She could not possibly pretend that she did not know of this litigation. The litigation terminated by a consent decree in the early part of 1905. She lies by till June 1907 and then files these suits claiming the whole estate. She applies for injunction and for the appointment of a Receiver—an application which was evidently unjustifiable or unnecessary because Mr. Justice Macleod, who heard it, dismissed it, making her bear her own costs. Then she makes an application for an *ex parte* decree. This application is also refused and she is again made to bear her own costs. In defending himself the first defendant has incurred costs to the extent of Rs. 2,000. The plaintiff has no immoveable property. She has either moneys of her own or this litigation is financed by somebody else. The authorities are *prima facie* against her contention in the suits. Mr. Padshah said he relied on some Privy Council ruling which would assist his client's contention. He did not give me the reference nor did I desire to judge of the merits of her claim, but in the event of her losing the case and having to pay costs the first defendant has nothing tangible to look to for payment of his costs. She is vigorously fighting these cases and taking steps which add to the costs of this litigation. In my opinion the first defendant was entitled to ask the Court to protect him.

It must be remembered that the same Act (VI of 1888) which abolished imprisonment of women added the second paragraph

(1) (1894) 21 Cal. 832.

1908.

SONABAI v. TRIBHOWANDAS.

to section 380 of the Code. Mr. Justice Sale in *Bidhatree Dassee* v. *Mutty Lall Ghose*[1] says, referring to section 380 :—

"The latter clause of the section was introduced by the Debtors Act (VI of 1888) which prohibits the arrest or imprisonment of a woman in execution of a decree for money." "The object of the section clearly is to provide for the protection of defendants in certain cases where in the event of success they may have difficulty in realising their costs."

It appeared to me that in the event of costs being awarded against the plaintiff the first defendant would not be able to realise them unless security was given and feeling that for his reasonable protection the orders asked for were, under the circumstances, necessary I ordered the plaintiff to deposit security in each of these cases.

Against this order of Davar, J., the plaintiff filed an appeal on the following among other grounds :—

1. That the learned Judge erred in ordering the appellant to give security for the respondent's costs of this suit.

2. That the learned Judge erred in holding that the suit was a suit for money within the meaning of section 380 of the Civil Procedure Code.

3. The learned Judge should have held that this suit was not a suit for money and should not have made the said order and should have in any events dismissed that part of the said summons with costs.

4. The learned Judge erred in holding that the section did not require that the suit should be wholly or substantially for money.

Weldon, for the appellant.

Setalvad, for the respondent.

Setalvad :—No appeal lies here against the order appealed against as the order is not mentioned in section 588 of the Civil Procedure Code amongst the orders against which appeals do lie : *Lutf Ali Khan* v. *Asgur Reza*[2]. If the appeal is sought to be brought under the Letters Patent we submit that the judgment

(1) (1894) 21 Cal. 832 at p. 836. (2) (1890) 17 Cal. 455.

appealed from does not decide the rights and liabilities of the parties and so no appeal lies: *Kishen Pershad Panday* v. *Tilukdhari Lall*[1]; *Mohabir Prosad Singh* v. *Adhikari Kunwar*[2]; *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*[3].

Weldon:—An appeal lies in this case, see *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla*[4].

Setalvad:—It is clear from the plaint and its annextures that this is a suit for money. Among other property she claims specifically certain moneys, see Exhibit B 1 to the plaint. No doubt the claim comprises certain immoveable property, but the section does not restrict that the suit should be substantially for money, it only says, "suit for money" and does not mean that the suit should be exclusively for money and for nothing else.

The following authorities were also cited in course of argument. *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*[5]; *Bai Porebai* v. *Devji Meghji*[6].

JENKINS, C. J.:—In favour of the competence of these appeals there is the direct authority of the Madras High Court in *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla*[4], and though much has been forcibly urged against this view, we ought, I think for the sake of uniformity, to accept this case as the basis of our decision and hold that an appeal lies.

Then had the learned Judge power under section 380 of the Civil Procedure Code to order the plaintiff to give security. Though the suits are not exclusively for money, each will, if the plaintiff succeeds, result in a decree for money on the relief sought, and I, therefore, think comes within the section, and there is no ground for holding that in making the orders under appeal the learned Judge exceeded the just limits of his discretion.

This appeal must, therefore, in each case be dismissed with costs.

(1) (1890) 18 Cal. 182.
(2) (1894) 21 Cal. 473.
(3) (1874) 13 Beng. L. R. 91.
(4) (1902) 26 Mad. 502.
(5) (1872) 8 Beng. L. R. 439.
(6) (1898) 23 Bom. 100.

1908.

SONABAI v. TRIBHOWANDAS.

BATCHELOR, J. :—These are appeals from an order of Davar, J., requiring the plaintiff-appellant under section 380, Civil Procedure, Code, to deposit Rs. 3,000 as security for the first defendant's costs in these suits.

The first question to be decided is whether an appeal lies from the order. That depends upon the further question whether the order is a "judgment" within the meaning of clause 15 of the Letters Patent, for it is admitted that an appeal will not lie upon any other ground. The point has frequently been before the Courts, and, as I understand the decisions, the Courts have always professed to follow the ruling laid down in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.*[1], where it was said that "judgment in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." It is unnecessary to refer to the numerous subsequent cases to which our attention has been called, for, as I have said, the test laid down above has been uniformly accepted. Reference must, however, be made to *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*[2], where the operation of the rule was further explained by Sir Richard Couch, C. J. That was a case where leave had been given to the plaitiff under clause 12 of the Letters Patent to institute his suit in the High Court of Calcutta, and the question was raised whether an appeal lay from the order. The Chief Justice held that it did, observing that it was "not a mere formal order, or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have. And it may fairly be said to determine some right between them (sc. the parties), namely the right to sue in a particular Court." I am of opinion that this reasoning covers the case of the order now under discussion, for the effect of it is, at least conditionally, to deprive the Court of the jurisdiction which it otherwise would

(1) (1872) 8 Beng. L. R. 433 at p. 452. (2) (1874) 13 Beng. L. R. 91 at p. 101.

have to try the plaintiff's suit. No doubt, jurisdiction would be recovered on the plaintiff's making the prescribed deposit, but for the time being and unless this further step is taken, the order ousts the jurisdiction of the Court. For these reasons I think that the appeal is competent, and this finding is in conformity with the decision of the Madras High Court in *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla*[1].

There remains the question whether the suits are "suits for money" within the meaning of the second paragraph of section 380. The phrase is not one which lends itself to very precise definition, and the matter is somewhat complicated by the difficulty of ascertaining the exact object which the Legislature had in view in adding this clause to the section. The clause was added by the Debtors Act (VI of 1888) which also added section 245A prohibiting the arrest or imprisonment of a woman in execution of a decree for money; and it has been held that the reason of the rule was to make provision for the costs of a successful defendant as against a woman plaintiff: see for instance Sale, J.'s remarks in *In the goods of Premchand Moonshee*[2]. This explanation is not perhaps perfectly satisfactory, since it fails to account for the circumstance that the rule is restricted to suits for money. But I cannot discover that the Legislature had any other or further object than that ascribed to it by Mr. Justice Sale, and therefore in my opinion the rule should receive a liberal interpretation. This view is in conformity with previous decisions, of which I need only notice *Degumbari Debi* v. *Aushootosh Banerjee*[3], and *Bai Porebai* v. *Devji Meghji*[4]. Applying the rule to the case before us, I think that both suits should be regarded as suits for money. Money is involved in the prayers in the plaints, and a determination in the plaintiff's favour would entail a decree for money. Moreover, the two suits are closely connected, and while in one of them, Suit No. 1517, there is a claim for shares of the total face value of nearly Rs. 2½ lákhs, in the other, Suit No. 1518, there is a claim for large amounts of cash, including sums of Rs. 30,000 and Rs. 24,000.

(1) (1902) 26 Mad. 502.
(2) (1894) 21 Cal. 832.
(3) (1890) 17 Cal. 610.
(4) (1898) 23 Bom. 100.

1908.

SONABAI v. TRIBHOWANDAS.

It has not been argued before us that the learned Judge, if he had the power to make the orders under appeal, ought not to have made them: and upon the merits of the orders I entirely concur with Mr. Justice Davar.

I agree, therefore, that these appeals should be dismissed with costs.

Attorneys for the appellant: *Messrs. Ardeshir, Hormasjee, Dinshaw & Co.*

Attorneys for the respondent: *Messrs. Matubhai, Jamietram and Madan.*

B. N. L.

APPELLATE CIVIL.

Before Chief Justice Scott.

1908. *July* 17.

JYANI BEGAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* UMRAV BEGAM AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan Law—Widow—Dower—Remission effective without acceptance by the heirs of husband—Money spent for the benefit of another—Obligation to repay.

According to Mahomedan Law a dower is a debt and its remission by a widow without acceptance by the heirs of the husband is effective.

It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises.

Ram Tuhul Singh v. *Biseswar Lall Sahoo*(1), and *Ruabon Steamship Company* v. *London Assurance* (2), referred to.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik, modifying the decree of B. R. Mehendale, Joint Subordinate Judge of Násik.

The plaintiffs sued to recover possession by partition of their three-fourths share of the property described in the plaint as heirs of one Akbaralli from defendant 1, Akbaralli's widow and from her tenant, defendant 2, with past and future mesne profits.

* Second-Appeal No. 725 of 1907.

(1) (1875) L. R. 2 I. A. 131. (2) [1900] A. C. 6 at p. 15.