

Section 387 of Act VIII of 1859 applies in terms to procedure only, and it has not been contended that under the earlier law the fresh suit was contemplated as a part of the older proceeding in execution.

We think the view we have expressed is supported by the opinions of the Judges *In the matter of the petition of Ratansi Kalianji* (1), and is consistent with the language of Act XIV of 1870. By treating a separate suit as a new proceeding, we construe [454] the Codes as having prospective effect. With reference to some of the decisions quoted, we think this view of the matter will not work injustice. As pointed out by Mr. Khare, the law allowed similar and suitable remedy while barring separate suit.

We, therefore, reverse the decree of the Assistant Judge, and restore that made by the Subordinate Judge dismissing the suit. Costs on the plaintiff throughout.

Decree reversed.

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Before Mr. Justice Scott.

FATMABAI (*Plaintiff*) v. AISHABAI (*Defendant*).*
[6th March, 1888.]

Res judicata—Suit by a woman for a share of property alleging herself to be A.'s widow—Prayer for declaration of her marriage to A.—Denial of her marriage to A. by defendant—Arbitration—Award of a certain sum in satisfaction of plaintiff's claim—Decree on award—No declaration as to her marriage—Subsequent suit by her as widow—Release—Civil Procedure Code (XIV of 1882), s. 13—Practice—Preliminary issue—Right to begin—Two counsel heard, in argument of preliminary issue.

The plaintiff Fatmabai in this suit alleged that both she and the defendant had been the wives of one Haji Adam Haji Ismail, a Cutchi Memon Mahomedan, who died intestate in 1878, leaving them his widows and other members of his family him surviving. The plaintiff had a daughter named Mariambai. Both plaintiff and defendant had since Haji Adam's death filed separate suits, in which they respectively claimed parts of his estate. In 1879 the defendant Aishabai had filed a suit (No. 616 of 1879) against the executors of her father-in-law's will, to recover certain money belonging to her husband. She obtained a decree, and the suit was referred to the Commissioner to make inquiries. In 1882 the present plaintiff Fatmabai and her daughter Mariambai filed a suit (No. 227 of 1882) against the present defendant Aishabai, claiming a share of the estate of her deceased husband Haji Adam. In that suit she alleged that she had been lawfully married to Haji Adam, and had ever since cohabited with him, and that her child Mariambai was his legitimate daughter; and she prayed (*inter alia*) for a declaration that she was the lawful wife and that Mariambai was the lawful daughter of Haji Adam. In the written statement filed by Aishabai in that suit she alleged that Fatmabai was not the lawful wife of Haji Adam, but only his kept mistress, and she denied that Fatmatai was entitled to share in his property.

[455] On the 3rd May, 1882, an order of reference was made, by which both the above suits, *viz.*, No. 616 of 1879 and No. 227 of 1882, "and all matter in difference thereon" were by consent of all parties thereto referred to arbitration. The arbitrators were the respective attorneys of the parties. Awards were duly made, and on the 1st October, 1883, decrees were passed in both suits in accordance with the said awards. By the decree and award in suit No. 227 of 1882, Fatmabai was to be paid by Aishabai a sum of Rs. 55,000 in full satisfaction of all the claims of Fatmabai and her daughter Mariambai upon the estate

* Suit No. 500 of 1887.

(1) 2 B. 148 (182, 208, 218).

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of Haji Adam, the rest of the estate being declared the sole property of Aishabai. The material part of the decree was as follows:—"This Court doth by consent pass judgment according to the said award * * * and doth order that the said Aishabai do pay for the said Fatmabai to her attorneys, Messrs. Tyabji and Dayabhai, within seven days after the date of this decree, the sum of Rs. 55,000 in full settlement of all and singular the claims and claim of the said Fatmabai and Mariambai or either of them against or upon the estate of the said Haji Adam Haji Ismail whatsoever and wheresoever * * * and doth declare that upon the payment of the said sum of Rs. 55,000 by the said Aishabai to the said Fatmabai as aforesaid, all claims whatsoever of the said Fatmabai and Mariambai or either of them upon the estate of the said Haji Adam Haji Ismail, in the hands of any person whatsoever or upon the said Aishabai as heir of the said Haji Adam Haji Ismail personally or otherwise howsoever, shall be considered to have been fully satisfied by the said Aishabai and absolutely waived for ever by the said Fatmabai and Mariambai; and doth further declare that the said Aishabai is entitled absolutely to all the rest of the estate and effects of the said Haji Adam Haji Ismail as her sole property as against the said Fatmabai and Mariambai."

The defendant Aishabai in 1882 also filed another suit (No. 198 of 1882) against her father-in-law's executors, and recovered certain ornaments which she alleged to be her *stridhan*.

In October, 1886, Aishabai married again; and in December, 1887, Fatmabai filed the present suit against her, alleging that by the law and custom of Cutchi Memons Aishabai had by reason of such second marriage forfeited all rights and interests to and in the property of her first husband Haji Adam, and also to the ornaments which she had recovered in the last mentioned suit, and she claimed that the said property and ornaments now belonged to her (Fatmabai) as sole surviving widow of the said Haji Adam. She prayed for a declaration that Aishabai had by her second marriage forfeited her right to the said property and ornaments, and that she (the plaintiff) was now entitled thereto; that the defendant might be ordered to deliver, &c., &c.

The defendant Aishabai filed a written statement in which (*inter alia*) she contended that the plaintiff was never the wife of Haji Adam, but had been merely his kept mistress; that in suit No. 227 of 1882 she (the defendant) had denied that the plaintiff Fatmabai was the widow of Haji Adam; that the award and decree in that suit were not made upon the basis of her (Fatmabai's) being such widow, and she (the defendant) submitted that the said award and decree were a bar to the present suit. It was contended for the defendant (1) that the plaintiff had in the former suit prayed for a declaration that she had [456] been the lawful wife of Haji Adam; that the decree in that suit contained no such declaration, and that her prayer must, therefore, be taken to have been refused under s. 13 of the Civil Procedure Code (XIV of 1882), and that she was consequently not now entitled to sue as his widow—her claim to be his widow being *res judicata*; (2) that the decree in suit No. 227 of 1882 expressly declared that the Rs. 55,000 awarded to plaintiff by that decree was in full settlement of all her claim; and that she was, therefore, precluded from claiming against the estate in any possible contingency; and that, therefore, the defendant's remarriage gave her no right to sue; (3) that the latter part of the decree amounted to a release and assignment by the plaintiff Fatmabai to the defendant of all her (the plaintiff's) right to the property in question.

Held (1) that the *status* of the plaintiff as widow of Haji Adam was not *res judicata*. The question of the plaintiff's marriage with Haji Adam had not been controverted before the arbitrators and finally decided in a manner sufficient to establish *res judicata*. An award can only operate as an estoppel in respect of questions properly brought before and considered by the arbitrators; Explanation III of s. 13 of the Civil Procedure Code (Act XIV of 1882) does not apply where the Court is silent on a head of relief only claimed as ancillary to the main relief, and which by implication is rather granted than refused. It only applies where the Court is silent on an independent head of relief claimed and duly controverted.

(2) That the declaration in the former decree, that the Rs. 55,000 was paid to the plaintiff in full settlement of all her claims upon the estate, did not bar the present suit. The previous suit was brought by Fatmabai as widow against Aishabai as widow. The present suit was brought by Fatmabai as widow against Aishabai remarried. The ground relied upon in the present suit was a new ground not known and not in existence at the time of the former suit, *viz.*, that Aishabai was no longer a widow, and had, therefore, lost all legal right to the estate of

her late husband. There was not the necessary condition to establish an estoppel, viz., *eadem causa petendi* and *eadem conditio personarum*.

(3) But that the award and release contained in the decree constituted a binding agreement, by which the plaintiff Fatmabai for the sum of Rs. 55,000 waived all her rights against Aishabai, including the claim made in the present suit, which existed at the time of the award as a present right dependant on a contingency, and the suit, therefore, should be dismissed.

At the hearing of a case on a preliminary issue the defendant, by whom the issue is raised, has the right to begin.

Two counsel for the same party may be heard in argument of a preliminary issue.

THE plaintiff in this suit alleged that both she and the defendant had been the wives of one Haji Adam Haji Ismail, a Cutchi Memon Mahomedan, who died intestate in Bombay in April, 1878, leaving these his widows and other members of his family [457] him surviving. The plaintiff Fatmabai had a daughter named Mariambai.

In 1879 the defendant Aishabai filed a suit (No. 616 of 1879) against the executors of the will of Haji Ismail Haji Habib, who was the father of her husband Haji Adam, claiming certain money which stood to her husband's credit in the books of the said Haji Ismail; and on the 10th April, 1882, a decretal order was made in her favour as the widow of the said Haji Adam; and the suit was referred to the Commissioner, in order that certain inquiries might be made.

In June, 1882, the present plaintiff Fatmabai and her daughter Mariambai filed a suit (No. 227 of 1882) against the present defendant Aishabai, claiming (*inter alia*) to recover a share of the estate of her deceased husband Haji Adam. In that suit she alleged that she had been lawfully married to him about sixteen years previously, and had ever since cohabited with him, and that her child Mariambai was his legitimate daughter, and had always been acknowledged as such by him. The first prayer of the plaint in that suit was that it might be declared that she was the lawful wife, and that Mariambai was the lawful daughter, of the said Haji Adam Haji Ismail.

In the written statement filed by Aishabai in that suit she alleged that Fatmabai was not the lawful wife of Haji Adam, but only his kept mistress, and she denied that Fatmabai was entitled to share in his property.

On the 3rd May, 1882, an order of reference was made, by which both the above mentioned suits, viz., suit No. 616 of 1879 and suit No. 227 of 1882, "and all matters in difference therein" were by consent of all parties thereto referred to arbitration. The arbitrators were the respective attorneys of the parties. Awards were made on the 11th September, 1883; and on the 1st October, 1883, decrees were passed in both suits in accordance with the said awards. By the decree and award in suit No. 227 of 1882 Fatmabai was to be paid by Aishabai a sum of Rs. 55,000 in full satisfaction of all the claims of Fatmabai and her daughter Mariambai upon the estate of the said Haji Adam Haji Ismail, the rest of the said estate being declared the sole property of Aishabai. [458] The material part of the decree was as follows:—"This Court doth by consent pass judgment according to the said award . . . and doth order that the said Aishabai do pay for the said Fatmabai to her attorneys, Messrs. Tyabji and Dayabhai, within seven days after the date of this decree, the sum of Rs. 55,000 in full settlement of all and singular the claims and claim of the said Fatmabai and Mariambai or either of them against or upon the estate of the said Haji Adam Haji Ismail whatsoever and wheresoever . . . and

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doth declare that upon the payment of the said sum of Rs. 55,000 by the said Aishabai to the said Fatmabai as aforesaid, *all claims whatsoever* of the said Fatmabai and Mariambai or either of them upon the estate of the said Haji Adam Haji Ismail, in the hands of any person whatsoever or upon the said Aishabai as heir of the said Haji Adam Haji Ismail *personally or otherwise howsoever, shall be considered to have been fully satisfied by the said Aishabai and absolutely waived for ever by the said Fatmabai and Mariambai*; and doth further declare that the said Aishabai is entitled absolutely to all the rest of the estate and effects of the said Haji Adam Haji Ismail as her sole property as against the said Fatmabai and Mariambai."

The defendant Aishabai in 1882 also filed another suit (No. 198 of 1882) against the executors of her father-in-law, Haji Ismail Haji Habib, in which she claimed certain ornaments as her *stridhan*. She obtained a decree and recovered the ornaments.

In October, 1886, the defendant Aishabai married again. Her second husband was one Haji Jan Mahomed Haji Jusub.

On the 10th December, 1887, the plaintiff Fatmabai filed the present suit against Aishabai, alleging that, by the law and custom of the Cutchi Memons, Aishabai by reason of such remarriage had forfeited all rights and interest to and in the property of her first husband, the said Haji Adam Haji Ismail, and also to the ornaments which she had recovered by the last mentioned suit; and she claimed that the said property and ornaments now belonged to her (Fatmabai) as sole surviving widow of the said Haji Adam Haji Ismail. She prayed for a declaration that Aishabai had by her remarriage forfeited all right to the said property and ornaments, and that she (the plaintiff) was [459] now entitled thereto; that the defendant might be ordered to deliver, &c., &c.

The defendant Aishabai filed a written statement, in which (*inter alia*) she contended that the plaintiff was never the wife of Haji Adam Haji Ismail, but had been merely his kept mistress; that in suit No. 227 of 1882 she, (the defendant), had denied that the plaintiff Fatmabai was the widow of the said Haji Adam; that the award and decree in that suit were not made upon the basis of her (Fatmabai) being such widow; and she (the defendant) submitted that the said award and decree were a bar to the present suit.

By an order in chamber, Scott, J., directed that the following preliminary issue should be tried, *viz.*, whether the plaintiff is not precluded from bringing this suit, or obtaining the relief prayed, by reason of the proceedings in suit No. 227 of 1882 and the award and decree therein.

Lang, Jardine, and Telang, for the plaintiff.

Latham (Advocate General), *Farran*, and *Inverarity*, for the defendant.

Latham.—A preliminary issue is really a demurrer; so we have a right to begin.

[SCOTT, J.—Yes, I think so.]

Latham.—The question is, whether by the decree in suit No. 227 of 1882 the plaintiff Fatmabai is not barred from making any further claim against the estate of Haji Adam Haji Ismail. In suit No. 227 of 1882 she contended that she was his widow, and her daughter his legitimate child, and that as one of his two widows she was entitled to share in his estate. In that suit the defendant Aishabai claimed to be the sole widow. By the decree in that suit, Fatmabai got Rs. 55,000, and Aishabai took the

rest of the estate. Fatmabai now contends that by Aishabai's remarriage she has forfeited her right to the estate, and that she (Fatmabai) as sole widow takes it. Fatmabai now claims as widow. But she did so also in the former suit, and she prayed for a declaration that she had been Haji Adam's lawful wife. The decree, however, does not grant that prayer. It must, therefore, be held to have [460] been refused—s. 13 of the Civil Procedure Code (Act XIV of 1882), Expl. III. That point is then *res judicata*. A decree on an award has the same effect as any other decree—*Wazeer Mahton v. Chuni Singh* (1); *Dunn v. Murray* (2); *Smith v. Johnson* (3); *Katrik Chandra Pal v. Sridhar Mandal* (4).

But even if the decree, instead of refusing her the declaration she prayed for, had expressly granted it, Fatmabai's present claim would be equally barred. For the decree provides that the payment of Rs. 55,000 is in full settlement of all her claims. That clause precludes her from making any claim against the estate in any possible contingency. She is excluded not merely as against Aishabai. If Aishabai were dead, Fatmabai is by this clause barred from making any claim against the estate, which would then go to Haji Adam's heir. Aishabai's remarriage therefore, gives Fatmabai no right. Under the decree all her claims, as widow, are gone, but now she claims again as widow. The decree gives the rest of the estate to Aishabai absolutely. As to the effect of this, see *Ram Narain Sing v. Pearay Bhuqut* (5); *Bolye Chund Dutt v. Khetterpaul Bysack* (6).

Again, by the decree all claims against Aishabai *personally* are given up. It is clear, then, that the waiver given by Fatmabai was not limited to claims against Aishabai as widow of Haji Adam, *i.e.*, so long as she remained his widow. The fact, therefore, that she has now ceased to be a widow, is of no consequence. Fatmabai is equally barred. We submit that the effect of the decree is (1) that Fatmabai is precluded, not merely from making a claim to the estate as against Aishabai, but that she can make no claim against it as against any one; (2) that Aishabai takes the estate absolutely; and that it is not forfeitable in her hands. She is free to do with it as she pleases.

Lang, contra.—This suit is not barred by the decree in suit No. 227 of 1882. That suit was by Fatmabai as widow against Aishabai as widow. It has been argued that because Fatmabai's prayer in that suit for a declaration that she was the lawful [461] wife of Haji Adam was not expressly granted by the award and decree, it must be taken to have been refused. That is not so. I submit that her rights as widow were by the decree expressly recognised. The award of Rs. 55,000 to her was made to her as widow, and was equivalent to a declaration that she was the lawful wife of Haji Adam. For it was only as his lawful wife that she had any claims at all upon the estate. As concubine she had none, and certainly the arbitrators would not have awarded her Rs. 55,000 as such. So that the award and decree affirm her position as widow. Then, as to the second point, we submit that the decree passed on the award must be treated as a release, and, as such, its effect is limited only to claims which were in the contemplation of the parties at the time it was made. As to the effect of general words in a release *Directors, &c., of London and South Western Railway Company v. Blackmore* (7). It is clear that Aishabai's remarriage was not then in contemplation or considered at all. The suit was brought against her as

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(1) 7 C. 727.

(2) 9 B. & Cr. 780.

(3) 15 East. 213.

(4) 12 C. 563.

(5) 9 C. 830.

(6) 11 B.L.R. 459.

(7) L.R. 4 Eng. and Ir. Ap. 610 (623).

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widow. The only rights in dispute were the rights of plaintiff and defendant as widows. A suit against a person as heir to another is no bar to a subsequent suit against him in another capacity.

[SCOTT, J.—The question is, did the award and decree in the prior suit deal only with the then existing relations of the parties, or was it intended to deal with all the relations that might possibly arise between them?]

Yes, and we say it dealt only with the then existing relations. The case of *Ram Narain Sing v. Pearay Bhugut* (1) was as to a widow's interest in immoveable property under the Hindu law, and the point was, what words were sufficient to give her an absolute interest. In this case we say the words of the decree gave Aishabai an absolute interest so long as she was a widow, but on her remarriage her interest ceased. He cited *Sreemutty Rabutty Dossee v. Sibchunder Mullick* (2).

Telang on the same side. —Even if the arbitrators had decided that Fatmabai was not the lawful wife of Haji Adam, that [462] decision would not have been *res judicata*, as that point is not mentioned in the decree—*Devarakonda Narasamma v. Devarakonda Kanaya* (3); *Tekait Doorqa Persad Singh v. Tekaitni Doorqa Konwari* (4).

Latham in reply. —The decree cannot be merely regarded as a release; but even as a release it is sufficient to bar this suit. As to the case of *Sreemutty Rabutty Dossee v. Sibchunder Mullick* (2), see *Bolye Chund Dutt v. Khetterpaul Bysack* (5). As to second marriage of Hindu widows and its effect, see Mayne's Hindu Law, para. 472. and Act XV of 1856. The award and decree were intended to settle all claims that could be made against Aishabai either as a widow or personally. This is a claim against her personally. Can it be argued that, if Aishabai had died, Fatmabai might have made a claim for the property? If not, how can she claim on Aishabai's remarriage?

JUDGMENT.

6th March. SCOTT, J.—In this suit Fatmabai, as widow of one Haji Adam Haji Ismail, sued Aishabai, also widow of Haji Adam, and claimed a share of the sum which Aishabai had received as such widow, on the ground that she (Aishabai) has forfeited her share by remarriage. Aishabai has replied, amongst other things, that Fatmabai in a previous suit against her put forward a claim, as widow, to money of the late husband in Aishabai's hands, and that the Court in that previous case decided that Fatmabai was not lawfully married to Haji Adam. Aishabai has further replied in the present suit that in the previous suit a sum of money had been awarded to Fatmabai in final settlement of all claims she might have against Aishabai. Aishabai, therefore, now pleads that the question in dispute in the present suit was finally adjudicated in a previous suit between the same parties, and cannot, therefore, be entertained by the Court a second time. She relies, of course, upon s. 13 of the Civil Procedure Code.

That section, as far as it concerns the present case, runs as follows:—
“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and [463] 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

(1) 9 C. 830.
(4) 5 I.A. 149.

(2) 6 M.I.A. 1.
(5) 11 B.L.R. 459 (472).

(3) 4 M. 134.

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. *Explanation I.*—The matter above referred to must in the former suit have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other. *Explanation II.*—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. *Explanation III.*—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused." This section only reproduces in a codified form the law of estoppel by record which is set out at length in the *The Duchess of Kingston's Case* and the notes thereon in Smith's *Leading Cases*, Vol. II, p. 812, at p. 830 (9th ed.).

The conditions for the exclusion of jurisdiction on the ground of *res judicata* are most succinctly stated in the Roman law cited by Knight Bruce, V. C., in *Burrs v. Jackson* (1). There must be the concurrence of *idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum*; and Pothier (*Traité des Obligations*, para. 894), says: "De la chose jugée. Pour qu'il y a lieu à l'exception, il ne suffit pas que la chose que vous me demandiez soit la même que vous m'aviez demandée il faut que vous la demandiez pour la même cause pour laquelle vous l'aviez demandée. Oportet ut sit eadem causa petendi..... la même chose peut m'être due en vertu de plusieurs différentes causes d'obligations;" and again in para. 896 he says: "Quelque générale qu'ait été ma première demande en revendication d'une chose le jugement qui en a donné congé ne m'exclut pas de former de nouveau une demande en revendication lorsque je prétends en être devenu propriétaire par un titre survenu depuis le jugement. Car ce jugement en jugeant que je n'étais pas alors propriétaire de cette chose n'établit [464] pas que je n'ai pu en acquérir depuis la propriété." This commentary applies literally to the second ground relied upon by Aishabai, *viz.*, that all claims were settled by the previous decision. That suit was brought by Fatmabai as widow against Aishabai as widow. The present suit is brought by Fatmabai as widow against Aishabai remarried. The ground relied upon is a new ground, not known, not in existence, at the time of the former suit—to wit, that Aishabai is no longer a widow, and has, therefore, lost all legal right to the estate of the late husband. There is not the *eadem causa petendi*. There is not the *eadem conditio personarum*; see also *Hunter v. Stewart* (2). I am of opinion, therefore, that, so far as her second ground goes, Aishabai has no claim to an estoppel.

The first ground remains for consideration. If Fatmabai was held by the Court in the previous case not to be a widow, she is certainly precluded from coming here for relief a second time as such widow. The former suit was referred to arbitration; an award was made; that award became in due course a consent decree. There is, therefore, no question as to its not being a judgment of a competent Court. The suit and all matters in difference between the parties were referred to the arbitrators. The prayer of the plaint was that she (Fatmabai) should be declared a lawful wife, and that her share as wife should be found and paid. The written statement denied Fatmabai's marriage. A number of affidavits were filed, with a view to a rule which stood over to the hearing. Those affidavits by consent were allowed to be used as evidence by the

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(1) 1 Y. & C. C. 585, *on appeal*, 1 Phil. 582.

(2) 31 L.J. Ch. 346.

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arbitrators. I have read them—not, of course, with any intention of reviewing the decision, but with a view of ascertaining what that decision included. The affidavits contain no proof sufficient to establish conclusively that Fatmabai was not married. Thus Aishabai herself only says: "I shall be able to prove at the hearing that Fatmabai was an orphan, brought to India as a slave girl, and was never recognised as a lawful wife." Fatmabai, on the other hand, in her affidavit, says she can prove both marriage and recognition by the family. The arbitrators only held one meeting. [465] They raised no issues. They called no witnesses. They gave their award without stating their reasons. They did not, in terms, refer to the question of marriage, but they awarded to Fatmabai, in full settlement of all her claims whatsoever upon Aishabai as heir, the sum of Rs. 55,000 out of the estate of the deceased husband, in the hands of Aishabai, and they said that Aishabai was entitled to the rest. The consent decree adopted the terms of the award. Thus, on a suit brought by a widow for a share in the estate of her husband, a substantial share was awarded. The inference is irresistible, that the arbitrators, although they were silent on the question of marriage, did not decide it in a sense adverse to the claimant. But, as regards the marriage itself, the question cannot have been controverted, and finally decided in a manner sufficient to establish *res judicata*. The arbitrators had not materials before them sufficient for the purpose. (See, as to the binding force of awards as estoppels, *Newall v. Elliot* (1).) I need not cite authorities for the proposition that an award can only operate as an estoppel in respect of questions properly brought before and considered by the arbitrators. (See Bigelow on Estoppel, p. 64.)

But it was argued by the Advocate General with his accustomed skill, that as a declaration was prayed that Fatmabai was lawfully married, and that as such a declaration was not given in express terms, expl. III of s. 13 of the Civil Procedure Code applies, and, therefore, as the relief claimed was not granted, it must be taken as having been refused. I think that sub-section refers to the case where several heads of relief independent of each other are claimed, put in issue, and duly controverted, and one of them is neither granted or refused; otherwise the principle that an estoppel must be certain (see Comyn's Digest "Estoppel") would be violated. Here the main relief claimed was the payment of money improperly detained from Fatmabai as widow, and the declaration asked was not an independent head of relief, but was a subordinate claim dependant on the money claim. The money claim is the substance of the suit, and the decree for money is an implied [466] admission of her *status* as wife, if that *status* was decided at all. I am of opinion, therefore, the arbitrators were not silent in the sense required to justify the application of Expl. III of s. 13.

His Lordship subsequently requested that the question as to the effect of the decree regarded as a release might be argued before him. The case came on again on the 12th March, 1888, for further argument on this point.

Latham (Advocate General), for the defendant:—The submission and award together constitute a contract—Russell on Awards, p. 8. That contract has now become part of the record. The words in the latter part of the decree import a release no doubt, but also much more. They really contain a family arrangement carried out by release and assignment—

(1) 1 H. & C. 797; 32 L. J. Ex. 120.

Stapilton v. Stapilton (1). First, regarding the decree as a release, how shall we ascertain the intention. Usually the intention of a release is ascertained from the recitals. Here the pleadings in the suits are really the recitals, and from them we discover the intention of the parties. From them we find the plaintiff claimed as widow; the defendant alleged that the plaintiff was only a concubine. That point went to arbitration. Then comes the release. It is clear the plaintiff's claim as widow was in contemplation when it was made, and she gives it up on payment of Rs. 55,000. Reliance may be placed on cases in which, after release given, further property has been recovered, as in *Turner v. Turner* (2). There, however, the right to share was admitted, and the only question was as to the amount. But here the *status* of the plaintiff was questioned, and her right to share at all was denied, and she was bought out. Further, she bases her claim in her plaint on an alleged custom of her caste on the re-marriage of widows. She must have known of that custom at the date of the release. She must also have known that Aishabai's marriage was possible, and that on such marriage she would by the custom she alleges be entitled to the property. These then were contingent rights possessed by her at the date of the release. All these she gave up by the release.

[467] But the decree contains not merely a release, but also a declaration, which amounts to an assignment by Fatmabai to Aishabai of all the rest of the estate.

[SCOTT, J.—Would this assignment pass future interest?]

We say that the claim of Fatmabai on Aishabai's re-marriage (if any) was not a future interest, but a present though contingent interest. It was a right similar to that which she might have claimed on Aishabai's death. Aishabai is declared to be entitled to the rest of the estate "absolutely." It has been suggested that this gives her no more than a widow's estate. That is not so. This is a legal document; words of conveyance are to be taken most strongly against the grantor—*Bolye Chund Dutt v. Khetterpaul Bysack* (3). In *Sreemutty Rabutty Dossee v. Sibchunder Mullick* (4) the widow was acting only for her deceased husband.

Lastly, we say this was a family arrangement, which was final. It is clear the transaction was regarded as a compromise of a doubtful right. The arbitrators do not come to an express finding as to whether Fatmabai was lawful wife or not, but give her a sum of money to induce her to relinquish her claim. The cases discussed in the notes to *Stapilton v. Stapilton* (1) apply here.

Inverarity proposed to address the Court.

Jardine objected to a second counsel being heard. The case is down for hearing. It is true it is on a preliminary issue, but that can make no difference. Two speeches by separate counsel for the defendant are not allowed at the hearing of a case. The points raised here are, no doubt, points of law, but if two counsel are heard for that reason, then in every case in which the issues raise points of law to counsel must be heard. There is nothing to distinguish a hearing on a preliminary issue from the ordinary hearing of a case.

Inverarity:—A preliminary issue is analogous to a demurrer. He cited Chitty's Archbold, p. 642.

(1) 2 White and Tudor's L. C., p. 920 (6th ed.).
 (3) 11 B.L.R. 459.

(2) 14 Ch. D. 829.
 (4) 6 M. I. A. 1.

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Latham.—Mr. Lang and Mr. Telang were both heard in the former argument of this case.

[468] SCOTT, J.:—I have consulted Bayley, J., and he agrees with me that two counsel ought to be allowed to address the Court.

Inverarity.—This was clearly a family arrangement, and the release in the decree was a complete release to the estate. The fact that the attorneys of the parties were the arbitrators, is strong evidence to show that the settlement was intended to be final. The plaint in suit No. 227 of 1882 stated that Aishabai had Rs. 1,50,000 of the estate in her hands. If Fatmabai was the lawful widow, she was entitled to share in that. She consented to take less than a half share, and to give up all claim against the estate.

Jardine, for the plaintiff, *contra*.—There is no evidence that this was a family arrangement. The document before the Court is simply a decree.

By the decree Rs. 55,000 is paid to Fatmabai, and a balance is left in Aishabai's hands. Fatmabai's claim in suit No. 227 of 1882 was as a widow. The decree was made in that suit, and she got the Rs. 55,000 in full settlement of the decree. The real point of dispute in that suit was whether Fatmabai was to be regarded as the widow of Haji Adam or not. The decree recognised her as such, and effected a partition of the estate between them as widows. The word "absolutely" merely meant that neither was to interfere with the other in the enjoyment of her share. Aishabai could not take more than a widow's interest—*Sreemutty Rabutty Dossee v. Sibchunder Mullick* (1). The decree is to be interpreted having regard to the circumstances in which it was passed and what was contemplated by the parties. The only point at issue was whether Fatmabai was entitled to a widow's share—*Lyall v. Edwards* (2). The present claim is as to a new accretion—*Turner v. Turner* (3).

JUDGMENT.

SCOTT, J.—There is no doubt that a release though expressed in general terms may be restrained to what was the intention of the parties, but that intention must be found in the facts of each case. What, then, are the facts of this case? Haji Adam [469] dies, leaving considerable property. Aishabai, the present defendant, brings a suit (No. 616 of 1879), to establish her right as his widow to that property, and obtains a decree for nearly two lakhs of rupees. Fatmabai, the plaintiff, brings a suit, No. 227 of 1882, as another widow of the deceased, for her share of what was awarded to Aishabai. Aishabai denies in that suit that Fatmabai was either legally married, or acknowledged as a wife. Interrogatories are administered, and a number of affidavits filed on either side. Aishabai says she is able to prove that Fatmabai was an orphan slave girl, and never lawfully married; and relies on the description of herself as "wife" and of Fatmabai as "another woman, Fatmabai, a Georgian slave of my son" in the will of her husband's father. Fatmabai, on the other hand, says she is prepared to prove both her marriage and an acknowledgment of her as wife. The suit, obviously of a painful character to the family, instead of being fought out in Court is referred to the arbitration of Mr. Cumrudin Tyabji and Mr. Bhaishankar, solicitors of the plaintiff and defendant respectively. The arbitrators do not take

(1) 6 M.I.A. 1.
(3) 14 Ch. D. 829.

(2) 6 H. & N. 337; 30 L. J. Ex. 193.

fresh evidence, as the parties agree that "all the points in difference are contained in the affidavits." which are admitted as evidence. The whole proceedings are of a non-contentious character. The partners of the two arbitrators appear for the parties in the suit. There is only one meeting, no issues are settled, and finally the arbitrators give their award without reasons, allotting to Fatmabai, Rs. 55,000. The award is subsequently by agreement of the parties embodied in a consent decree. That decree recites, first, the prayer of the plaint—next, the reference ordering that the suit and all matters in difference should be referred to the arbitration of Messrs. Tyabji and Bhaishankar—and then the Court proceeds to pass judgment, according to the award, in the following terms, which are the terms of the award, and contain the words I have now to construe, viz., "that the said Aishabai do pay to Fatmabai's attorneys the sum of Rs. 55,000 in full settlement of all and singular the claims of Fatmabai in the estate of the deceased whatsoever and wheresoever," and the decree further declares that, upon the payment of the said sum, all claims whatsoever of Fatmabai upon the estate of the deceased in the hands [470] of any person whatsoever or upon Aishabai as heir of the deceased personally, or otherwise, shall be considered to have been fully satisfied by Aishabai and absolutely waived for ever by Fatmabai—and it finally declares that Aishabai is entitled absolutely to all the rest of the estate and effects of the deceased as her sole property as against Fatmabai.

It is important to observe, first, that the award here set out goes much beyond the submission in the clauses declared to be abandoned, and yet it is adopted *ipsissimis verbis* by the parties in the consent decree; and secondly, that the arbitrators, both lawyers, never touched the question of wife or no wife, whilst they gave Fatmabai much less than the moiety claimed. This decree was passed and the money paid in 1883.

The next incident in the history of the case is that Aishabai remarried in October, 1886. Fatmabai then filed her plaint in the present suit, praying that it might be declared, first, that Aishabai by her re-marriage has forfeited all right and interest in the property of the deceased, and second, that Fatmabai being now sole widow of the deceased is entitled to all his property in the hands of Aishabai. The case then came on for hearing before me on the following preliminary issue, namely, "whether the plaintiff is not precluded from bringing this suit or obtaining the relief prayed by reason of the proceedings in Suit No. 227 of 1882, and the award and decree therein." I have already found that the defence of *res judicata* was not sustainable on that decree. But on the defence, that the award and decree constituted a valid and binding release, conveyance, or final settlement of all claims whatsoever Fatmabai might have upon Aishabai, I asked for further argument, and the matter was fully and ably re-argued a fortnight ago.

After giving the matter most careful and anxious consideration I have come to the following conclusion. It is settled law that the general terms of a release do not include questions that could not have been in the contemplation of the parties (1). Now, was this present claim of Fatmabai on Aishabai in the contemplation of the parties—or ought it to be reasonably supposed to have [471] been in their contemplation at the date of release? The claim did exist at the time in the sense of its being a present right to a contingent interest, the contingency not having yet arisen. Was the contingency, *i.e.*, the remarriage of Aishabai,

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(1) See Story's Equity Jurisprudence, s. 145. Pollock on Contracts, p. 475.

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so improbable that it escaped consideration? Fatmabai cannot be considered to have been ignorant of her alleged right to the whole on the remarriage, as she brought this suit at once on that event occurring, and she set up a custom which can only be proved on the basis of frequent remarriages in her community. I do not think it was a right Fatmabai was likely to overlook.

Another way, no doubt, of considering whether the release covers such a right is to look at the recitals, or at what stands, in this case, in the place of recitals, which are always used as a key to the construction of the general words of a release—*Boyes v. Bluck* (1); *Simons v. Johnson* (2); *Lyall v. Edwards* (3). That is to say, we must look at the terms of the reference, which is of "the suit and all matters in difference between the parties;" and we must next consider, from the pleadings, what were "the matters in difference." We find them to be a claim on the part of Fatmabai as widow, and a denial of the claim and of the widowhood on the part of Aishabai. That was the matter in difference which was referred to arbitration. If the operative words are to be wholly controlled by the recitals in all cases, I should, I think, be bound to hold that the award referred to the matter in difference only, and that the right intended to be released by general words was only Fatmabai's right as widow on the estate in Aishabai's hands as widow. But the operative words must not be controlled and interpreted by the recitals only. They are one of the tests of the intention of the parties, which must be inferred from all the circumstances. In short, every case must stand on its own facts, and the facts here are (1) no issues were raised; (2) there were no direct findings on the precise points in dispute; (3) the sum awarded to Fatmabai was less than one half which she would have taken as widow; (4) the arbitrators never, in terms, decided the main question at all; (5) although the award was defective from want of findings on all the matters in difference, there was no objection taken by either [472] side to its validity; (6) that, in short, the arbitrators diverged from the submission, and the parties consented to the divergence. All these facts made me think there was a distinct intention amongst all the parties that the decision arrived at by the arbitrators should be treated by all the parties as a sort of final compromise and settlement, not only of the disputes submitted, but of all the disputes that could arise between the two ladies as regards the estate of the deceased husband. This view accounts for the comprehensive terms of the operative part of the release, whose introduction otherwise it is almost impossible to explain. It can hardly be said that the terms have no meaning. Two experienced lawyers conducted the case for the parties, and two other experienced lawyers acted as arbitrators, and gave the award such terms as "all claims whatsoever upon the estate shall be absolutely waived for ever," and "Aishabai is entitled absolutely to all the rest of the estate as her sole property as against Fatmabai." These words would not have been used by able lawyers, nor would they have been adopted by the parties who were acting under advice in their consent decree, if they had not intended to settle all possible claims. It seems to me the consent decree was a sort of family arrangement intended to finally close very disagreeable litigation.

If I am right in my view of the award and decree, *viz.*, that when read by the light of the facts and circumstances they must be taken as

(1) 22 L. J. C. P. 173.
(2) 6 H. & N. 337; 30 L.J. Ex. 193.

(2) 3 B. & Ad. 175.

a final settlement of all disputes, then the particular claim put forward by the present suit must be taken to be included, unless it was non-existent at the time. But, as I have already said, it was a present right dependent on a contingency, and did then exist just as much as a right contingent on a death exists. Remarriage clearly, in Fatmabai's opinion, obtains in her community, as she bases her claim on a custom by which Aishabai forfeits the estate of her husband whenever she takes to herself a second.

I think, therefore, the terms used must be held to cover, and to have been intended to cover, Fatmabai's rights in case of Aishabai's remarriage. It was argued that this question is concluded [473] by the decision of the Privy Council (1), and that I am bound to hold that Fatmabai only waived her right on the property so far as it was a widow's estate in the hands of Aishabai. In that case by a family arrangement a childless Hindu widow was given Rs. 55,000 "for her sole absolute use and benefit." Yet in spite of these words she was held to have taken, with reference to her husband's representatives, only a widow's estate, and not an estate to her separate use in the English sense. But their lordships say the money was given for her absolute use as against the parties to the deed, and that the deed was intended to settle all accounts between the parties. Applying that decision to the present matter, I should say that as against Fatmabai, a party to the release, Aishabai held absolutely, although, as against other members of the husband's family, Aishabai may only hold a widow's estate. If I were to follow the case cited in *Bolye Chand Dutt v. Khetterpaul Bysack* (2) there would be no difficulty in saying that Fatmabai intended to convey an absolute estate, as the words here are as strong, if not stronger, than the words which the Court had to construe in that case.

I think, on the whole, the award and release must be held to constitute a binding agreement by which Fatmabai, for the sum of 55,000 rupees, waived all her rights against Aishabai, including the present claim. I, therefore, decide the preliminary issue in favour of the defendant. The suit must be dismissed with costs.

Attorneys for the plaintiffs :—Messrs. *Tyabji and Dayabhai*.

Attorneys for the defendant :—Messrs. *Bhaishankar, Nanabhai and Dinsha*.

12 B. 474.

[474] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Scott.

E. C. K. OLLIVANT (*Original Defendant*), Appellant v. RAHIMTULA NUR MAHOMED AND ANOTHER (*Original Plaintiffs*), Respondents.*
[30th March and 6th April, 1888.]

Municipal Act (Bombay) III of 1872, s. 198—Obstruction—Power given in Act for public benefit—Construction.

The eaves of certain buildings belonging to the plaintiff projected over the public road. On the 17th May, 1886, the Municipal Commissioner of Bombay gave notice to the plaintiff requiring him within thirty days to remove the said eaves as being "a projection, encroachment or obstruction" within the meaning

* Suit No. 293 of 1886.

(1) 6 M.I.A. 1.

(2) 11 B.L.R. 450.

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