

that execution of the said decree as regards the said costs be stayed until the said seventh day of September one thousand eight hundred and eighty-eight."

Attorneys for the appellant:—Messrs. *Little, Smith, Frere, and Nicholson.*

Attorney for the respondent:—Mr. *Mirza Hossein Khan.*

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*Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Bayley.*

FATMABAI (*Original Plaintiff*), Appellant v. AISHABAI (*Original Defendant*), Respondent.\* [12th October, 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 (Act XIV of 1882), s. 13.*

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 [243] 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 Fatmabai was entitled to share in his property.

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 matters 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 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 whosoever \* \* \* 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

\* Suit No. 500 of 1887.

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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 sold 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.

[244] 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 in 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 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 (Act 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 the plaintiff by that decree was in full settlement of all her claims; 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*, affirming the decision of Scott, J., that the present suit was not barred under s. 13 of the Civil Procedure Code (Act XIV of 1882) by reason of the former suit No. 227 of 1882. Although Fatmabai litigated in the former suit as widow of Haji Adam as she did in the present suit, the matters "substantially in issue" in the two suits were quite distinct. In the former suit she claimed her share in the estate of Haji Adam as one of his lawful heirs entitled to succeed to him on his death. In the present suit her claim was based on a subsequent event by reason of which she contended that Aishabai's share was by law and custom forfeited, and reverted to the estate of Haji Adam.

*Held*, also, (affirming the decision of Scott, J.,) that the *status* of plaintiff as widow of Haji Adam was not *res judicata*. The plaint in suit No. 227 of 1882, no doubt, asked for a declaration that she was the widow of Haji Adam, and no such declaration had been made. But the declaration was not sought for by way of specific relief, but simply as the ground for the real and substantial relief to obtain which the suit was instituted, *viz.*, the payment by Aishabai of Fatmabai's share of Haji Adam's estate. Explanation III of s. 13 was not intended to apply to such a case.

*Held*, (reversing the decision of Scott, J.,) that the declaration in the former decree, that the Rs. 55,000 were paid to the plaintiff in full settlement of all her claims upon the estate, did not bar the present suit. The words of the award and decree were to be read with reference to the character in which the parties were litigating as widows of the deceased Haji Adam claiming to succeed to his property on his death. Such general language was to be controlled by the circumstances of the case. Upon the proper construction of the award there was no such clear intention shown to include in the settlement a contingent claim of the special nature now made as to preclude the plaintiff from setting it up in the present suit.

[245] THIS was an appeal from a decree passed by Scott, J. See I. L. R., 12 Bom. 454.

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 him surviving. The plaintiff Fatmabai had a daughter named Mariambai.

In 1879 the defendant Aishabai filed a suit (No. 616 of 1878), 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 abovementioned 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 [246] on the 11th September, 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. 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 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*

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*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 [247] of the *Cutchi Memons*, *Aishabai*, by reason of such re-marriage, 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 re-marriage forfeited all 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 Haji Ismail*, but had been merely his kept mistrees; 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.

After argument of the above issue, *Scott, J.*, held that the award and release constituted a binding agreement by which *Fatmabai* for the sum of Rs. 55,000 waived all her rights against *Aishabai*, including the present claim. He, therefore, found the preliminary issue in favour of the defendant, and dismissed the suit with costs (1).

The plaintiff appealed.

*Jardine* and *Telang*, for the appellant.

*Latham* (Advocate General) *Branson*, for the respondent.

#### JUDGMENT.

[248] SARGENT, C.J.—This is an appeal from a decision of *Scott, J.*, dismissing the appellant's suit by which, as widow of one *Haji Adam Ismail*, she claimed to recover from *Aishabai*, also a widow of *Haji Adam*, the share of her husband's estate, on the ground that the latter had forfeited it by remarriage.

The defendant by her written statement denied that appellant was a widow of *Haji Adam*, and pleaded that the proceedings in a previous suit, No. 227 of 1882, and the award and decree therein were a bar to the appellant maintaining the suit or obtaining the relief prayed therein.

(1) 12 B. 454 (473).

The above suit had been instituted by the appellant Fatmabai, alleging herself to be the widow of Haji Adam, to recover her share of the estate of her husband. The suit and all matters in difference between them were referred to arbitration, and a decree passed in terms of the award made by the arbitrators by which, without recording any finding or even expressing any opinion as to whether or no Fatmabai was the legal widow of Haji Adam, they directed Aishabai to pay to her the sum of Rs. 55,000 "in full settlement of all and singular the claims and claim of the said Fatmabai and her daughter Mariambai, or either of them, against or upon the estate of the said Haji Adam whatsoever and wheresoever."

We entirely agree with the Division Court that it was not precluded by s. 13 of the Civil Procedure Code (Act XIV of 1882) from trying the present suit by reason of the above suit. Although Fatmabai litigated in the former suit as widow of Haji Adam, as she does in the present suit, the matters "substantially in issue" in the two suits were quite distinct. In the former she claimed her share in the estate of Haji Adam as one of his lawful heirs entitled to succeed to him on his death. In the present suit her claim is based on a subsequent event, by reason of which she contends that Aishabai's share is by law and custom forfeited, and reverts to the estate of Haji Adam.

Again, as to the issue whether Fatmabai was the lawful wife of Haji Adam, that was also, no doubt, an issue between the parties in the former suit and a question which the arbitrators [249] had to decide; but the award, the terms of which are embodied in the decree, is silent on the subject; and it certainly could not be inferred from the award—assigning, as it does, to Fatmabai a considerable share of Haji Adam's estate—that the arbitrators had "decided" against her claim to be the widow of Haji Adam.

It was argued, however, that as the plaint in suit No. 227 of 1882 asked for a declaration that Fatmabai was the widow of Haji Adam, if no declaration was made to that effect, it must be taken to have been refused, having regard to expl. 3 of s. 13 of the Civil Procedure Code, which provides that "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." But the above declaration was not sought for by way of specific relief, but simply as the ground for the real and substantial relief, to obtain which the suit was instituted, *viz.*, the payment by Aishabai of Fatmabai's share of Haji Adam's estate; and we do not think the explanation under consideration was intended to apply to such a case. We, therefore, entirely agree with the Division Court that the proceedings and decree in suit No. 227 of 1882 did not operate as *res judicata* under s. 13 of the Civil Procedure Code (Act XIV of 1882) with respect to the subject-matter in issue in the present suit.

But it was further contended for the defendant that the award and decree constituted a valid and binding release or final settlement of all claims whatsoever, whether present or future, which Fatmabai might have on the estate of Haji Adam.

The award was in the following terms:—

"That the said Aishabai do pay, for the said Fatmabai, to her attorneys Messrs. Tyabaji and Dayabai, within seven days after the date of this decree, the sum of rupees fifty-five thousand 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

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Ismail whatsoever and wheresoever, and doth further decree that the said Fatmabai do maintain her infant daughter Mariambai so long as the said Mariambai shall remain unmarried, and shall also provide for [250] the marriage expenses of the said Mariambai, and doth declare that upon the payment of the said sum of rupees fifty-five thousand 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 the 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 important question is as to the proper construction to be placed on the general language of the concluding clauses. It was conceded that by the well-established rule of the construction of the general words of a release, for which it is sufficient to refer to the statement of it by Lord Westbury in *The Directors &c. of London and South-Western Railway Co. v. Blackmore* (1) the general words of the award must be confined to such claims as were presumably in the contemplation of the arbitrators, which *prima facie* would be the claims of Fatmabai and Mariambai as widow and daughter of Haji Adam to share by inheritance in his estate as being the subject of reference to arbitration. The Judge of the Division Court, however, considered that there were special circumstances which justified the general words being read in the largest sense of which they were susceptible, and, therefore, as including all possible claims whether present or future and contingent, and held that all parties must have so understood them. The circumstances relied on by him were (1) that 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 the one half which she would have taken as widow; (4) the arbitrators never, in terms, decided the main question at all; (5) though the award was defective from want of findings on all the matters in difference, there was no objection [251] taken by either side to its validity; (6) that in short, arbitrators deviated from the submission, and the parties consented to the divergence. The learned Judge says: "All these facts make me think that 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."

Now it is doubtless true that neither of the parties took any objection to the award, on the ground that it was defective from want of a finding on the main question in dispute whether Fatmabai and Mariambai were the widow and daughter of Haji Adam, and this circumstance may be ground for supposing that the award was intended to be a compromise by the arbitrators and regarded as such by the parties themselves; but as no other claims than those which Fatmabai and Mariambai had then preferred to share in the estate with Aishabai would be presumably present to the minds of the parties, the compromise could not, in our opinion, be

(1) L. R. 4 Eng. & Ir. App. 623.

properly read as covering more than those claims. Moreover, as there was no decision come to whether Fatmabai was the widow of Haji Adam, the general language of the release may well be explained by the natural anxiety of the arbitrators to prevent the possibility of the plaintiff, notwithstanding the award of Rs. 55,000, still preferring a claim to share in the estate on the basis of their being the widow and daughter of Haji Adam.

Much stress was laid, in argument, on the final direction in the award that Aishabai is entitled absolutely to all the rest of the estate and effects of the said Haji Adam as her sole property as against the said Fatmabai and Mariambai; but these words under the circumstances must be read with reference to the character in which the parties were litigating as widows of the deceased Haji Adam claiming to succeed to his property on his decease. The case of *Sreemutty Rabutty v. Sibchunder Mullick* (1) [252] shows that such general language may be controlled by the circumstances of the case.

Upon the whole we are unable to come to the conclusion—and it is necessary, we apprehend, to do so in order to decide in favour of the defendants—that upon the proper construction of the award there is such a clear intention shown to include in the settlement effected by them a future contingent claim of the special nature now under consideration as to preclude the plaintiff from setting it up in the present suit; and it is worthy of remark that though Mr. Bhaishankar, solicitor for the defendant in that suit and one of the arbitrators, is the solicitor for the defendant in this case, he has not taken the objection in the correspondence which preceded the filing of the plaintiff's suit.

We must, therefore, reverse the decree, and send back the case for disposal on the merits. Costs to abide the result.

*Decree reversed.*

Attorneys for appellant:—Messrs. *Tyabji and Dayabhai.*

Attorneys for respondent:—Messrs. *Jafferson, Bhaishankar and Dinsha.*

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*Before Sir Charles Sargent, Kt., Chief Justice and  
Mr. Justice Bayley.*

DHUNJIBHOY COWASJI UMRIGAR (*Original Defendant*),  
Appellant v. LISBOA (*Original Plaintiff*), Respondent.\*  
[11th and 21st December, 1888].

*Easement—Light and air—Obstruction—Injunction or damages—Lord Cairns' Act (21 and 22 Vic. C. 27)—Specific Relief Act I of 1877.*

The plaintiff owned a house in Girgaon road, Bombay, in which he had resided with his family for twenty-four years. Through certain windows in the south wall of his house, numbered respectively 3, 5, 7 and 8, he had during all that time enjoyed free access of light and air. In 1887 the defendant purchased the land to the south of the plaintiff's house, pulled down the building that then existed upon it, and proceeded to build a new one on the same site, the north wall of

\* Suit No. 515 of 1887.

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