1908.
September 14.

Present: Mr. Justice Wendt and Mr. Justice Wood Renton.

PALANIAPPA CHETTY *v.* GOMES *et al.*

D. C., Kalutara, 3,697.

Res judicata—*Dismissal of action for failure to give security for costs—Bar to fresh action—Civil Procedure Code, ss. 207, 417, and 418.*

Where a plaintiff is ordered, under section 417 of the Civil Procedure Code, to give security for costs, on the ground of the non-residence of the defendant within the jurisdiction of the Court, and he fails to do so, and his action is dismissed under section 418. the order of dismissal operates as *res judicata*, and bars a fresh action on the same cause of action.

Hariram Mohanji v. Lalbai[1] distinguished.

APPEAL by the first defendant from a judgment of the District Judge of Kalutara (P. E. Pieris, Esq.). The facts and arguments sufficiently appear in the judgments.

Bawa, for the first defendant, appellant.

H. Jayewardene (with him *C. de Jony*), for the plaintiff, respondent.

Cur. adv. vult.

September 14, 1908. WENDT J.—

This question in this case is whether the dismissal under section 418 of the Civil Procedure Code of a former action, on the failure of plaintiff to find the security ordered under section 417, is a bar to a second action for the same cause. The learned District Judge has held that it is not. The facts are as follows:—

Both actions are by the endorsee against the maker and endorser of the same promissory note. In the former action, which was brought in the District Court of Colombo, the first defendant, who was resident in Kalutara, before answering obtained an order directing the plaintiff to deposit Rs. 250 as security for his costs on or before June 26, 1907. The period was subsequently extended to July 10, but the deposit not having been made the action was on that day dismissed with costs. No application was made for leave to withdraw from the action, nor did plaintiff apply for an order to set the dismissal aside. On January 29, 1908, the present action was commenced. In his answer, besides pleas on the merits, the first defendant pleaded that the dismissal of the Colombo action was a bar to the present action, and this was tried as a preliminary issue. The District Judge held, following *Hariram Mohanji v. Lalbai*,[1] that the dismissal was not a bar, and first defendant has appealed.

[1] *(1902) I. L. R. 26 Bom. 637.*

Our law as to *res judicata* is to be found in section 207 of the Civil Procedure Code, which enacts that "all decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall hereafter be non-suited." To this section is appended the following "explanation":—

"Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action, a *res adjudicata*, which cannot afterwards be made the subject of action for the same cause between the same parties."

"Decree" is defined in section 5 on "the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the action or appeal." The dismissal of the Colombo case involved the adjudication that plaintiff could not maintain his action. It was therefore a decree, and a final decree, because so long as it remained in force nothing more could be done in the action. When it was passed, the right to recover the promissory note debt, which plaintiff had set up in that action, became a *res judicata*, and could not be litigated in a new action between the same parties.

The law enacted by the Indian Civil Procedure Code is not the same. It is true that the definition of decree (section 2) and the procedure in relation to security for costs (sections 380, 381) are substantially the same, but the provisions as to *res judicata* embodied in section 13 are essentially different from our section 207. Section 13 enacts that no Court shall try any suit or issue in which the matter directly and substantially in issue (first) has been directly and substantially in issue in a former suit, and (secondly) has been heard and finally decided in that suit. In short, the Court must have entered into the "merits" (to use a convenient term) and determined the rights of the parties thereupon. Hence the circumstance that in the Bombay case above cited no question of *res judicata* was raised before Starling J. Section 13 was not referred to at all. (To judge from the report, plaintiff's counsel did not contest the position that, if the cause of action and the parties were the same, the dismissal was a bar; he only submitted that the parties were not the same.) There being, then, no *res judicata*, the learned Judge had to decide whether there was any prohibition of a second action, and he held that there was not, and that he was not prepared to introduce one himself. See the older case of *Rungrav Ravji v. Sidhi Mohamed* [1]. It is true that in section 403,

[1] *I. L. R. 6 Bom. 482.*

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which allows a plaintiff whose action has abated or been dismissed to apply for an order setting aside the order of abatement or dismissal, an express prohibition is inserted against bringing a fresh action. But this is not on all fours with section 418, where plaintiff has the additional privilege of moving to withdraw from the action. It may well be that the Legislature considered the plaintiff's interests sufficiently protected when he had been given that privilege and also the right, on sufficient cause shown, to have the decree of dismissal set aside. (Compare also section 84 of our Code, where our Legislature has omitted the prohibition of section 103 of the Indian Code against the bringing of a second action.)

I would set aside the order appealed against, and, deciding the preliminary issue against the plaintiff, dismiss his action with costs in both Courts.

WOOD RENTON J.—

The question in this case is whether a plaintiff, whose action has been dismissed under section 418 of the Civil Procedure Code for failure to give security for costs, can bring a fresh suit against the same defendant on the same cause of action. The learned District Judge has answered this question in the affirmative on the authority of the decision of Starling J. in *Hariram Mohanji v. Lalbai* [1], in which it was held that the dismissal of a suit under section 381 of the Indian Code of Civil Procedure, which corresponds to our section 418, does not bar a fresh suit for the same cause of action. I venture to think that this decision is not applicable to the present case. Starling J. says in effect: "Section 381 of the Indian Code does not, like section 103 (dismissal for want of appearance of plaintiff), create a statutory bar to the institution of a fresh action, and it would be wrong for me to introduce such a prohibition." But it does not say that the dismissal of a suit under section 381 would not have precluded fresh proceedings if the case had come under section 13 of the Indian Code of Civil Procedure, which contains the Indian statutory law of *res judicata* (*cf.* on this point the decision of the Judicial Committee delivered by Lord Watson in *Chandkour v. Partab Singh* [2]. The question, therefore, that we have to decide is whether the dismissal of an action under section 418 of our Code comes within the range of the law of *res judicata* as it exists in Ceylon. I think that it does. Judgment of dismissal is a "decree," inasmuch as it finally disposes of the suit (*i.e.*, of the plaintiff's right to maintain the action) so long as it remains on the record (*Williams v. Brown* [3]). Being a "decree" it operates as *res judicata* in regard to that right under section 207, irrespective of the question which arises under the corresponding Indian section (section 13) whether the matter in issue between the parties in the second suit

[1] *(1902) I. L. R. 26. Bom. 637.* [2] *(1888) I. L. R. 16 Cal. 101.*
[3] *(1886) I. L. R. 8 All. 109 (Full Court).*

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has been heard and finally decided in the first. I do not think that in the case of 111, C. R., Galle, No. 4,564 [1], to which Mr. Jayewardene referred us, Sir Joseph Hutchinson C.J. could have meant to hold that for no purpose is there "any substantial difference" between section 13 of the Indian and section 207 of the Ceylon Code of Civil Procedure.

I would allow the appeal, and dismiss the respondent's action with all costs here and below.

Appeal allowed.