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FULL BENCH.

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FULL BENCH—APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

DAYACHAND NENCHAND (*Original Defendant*), *Appellant v.* HEMCHAND DHARAMCHAND, DECEASED, HIS HEIR, HIS DAUGHTER, BAI VIJLI, AND ANOTHER (*Original Plaintiffs*), *Respondents.**

[23rd June, 1880.]

Court Fees Act (VII of 1870), sch. II, cl. i, art. 17; and s. 7, cl. viii—Decree—Execution—Attachment—Remedy of person whose property is attached—Suit by claimant on attached property—Nature of suits under Civil Procedure Code (VIII of 1859), s. 246, and Act X of 1877, s. 283—Stamp on such suits—Valuation of suits for purposes of jurisdiction—Valuation of suits for fiscal purposes—Construction of Acts—Summary decision or order—Mortgage, mode of enforcing a decree on a.

Suits brought to set aside or to restore an attachment upon a house, in pursuance of the permission given in s. 246 of the Civil Procedure [516] Code, may be regarded either as "suits to obtain a declaratory decree or order where consequential relief is prayed," so as to fall within s. 7, cl. iv, art. (c) of the Court Fees Act (VII of 1870), or as suits to obtain or set aside a summary decision or order, in which case the stamp duty payable would be that prescribed by art. 17, cl. i, sch. II of the Court Fees Act. The Court Fees Act being a fiscal enactment, it is the duty of the Courts to treat such suits as belonging to the latter class (it being the more favourable to the suitor), and to impose fees accordingly.

Decisions under s. 246 of Act VIII of 1859, as to the removal or retention of attachments, are "summary decisions or orders" within the meaning of art. 17, cl. i, sch. II of the Court Fees Act (VII of 1870). The words "summary decision or order" in this clause of the Court Fees Act mean decision or order not made in a regular suit or appeal.

The construction which has been given to these words, or nearly similar words, in the Limitation Acts (*e.g.*, Act IX of 1871, sch. II, art. 15, and Act XV of 1877, sch. II, art. 13) affords no guide to their construction in the Court Fees Act. When Acts are in *pari materia* they may be treated as forming a Code and may be read together; but when this is not so, the construction which has been put upon one, cannot be relied upon as a guide to the contruction of another.

The valuation of suits, for the purpose of jurisdiction, is perfectly distinct from their valuation for the fiscal purpose of Court fees. Therefore, Court Fees Acts, which are fiscal enactments, are not to be resorted to for construing enactments which fix the valuation of suits for the purpose of determining jurisdiction.

Motichand Jaichand v. *Dadabhai Pestonji* (1) explained.

Ravloji Tamaji v. *Dholapa Raghu* (2) dissented from by Westropp, C.J.

A stamp of Rs. 10 is sufficient for the plaint or memorandum of appeal in a suit brought, under s. 246 of Act VIII of 1859, to restore an attachment upon a house which has been removed at the instance of an intervenient under that section.

A person whose property was attached was not compelled to resort, in the first instance, to an application under s. 246 of the late Civil Procedure Code, (Act VIII of 1859). There was nothing to prevent him from commencing his litigation by a regular suit, if such were his pleasure. Clause viii of s. 7 of the Court Fees Act (VII of 1879) would apply to such a suit. The language of that section is not limited to suits to set aside any special kind of attachments on land. It is large enough to include suits brought, in pursuance of the permission given by s. 246 of Act VIII of 1859, to set aside attachments on land as well as other suits for that purpose brought independently of that section.

The term 'land' in cl. viii, s. 7 of the Court Fees Act, does not include a house.

* Civil Reference No. 32 of 1879.

(1) 11 B.H.C.R. 186 (188, 189). (2) 4 B. 123.

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[517] *Quære*—Whether that clause includes all suits to set aside attachment upon land, or all such suits, except where the result of setting aside the attachment would be to alter or set aside a summary decision or order of any Civil Court not established by Letters Patent or of any Revenue Court.

In order to enforce a decree which establishes a mortgage and directs a sale of the mortgaged premises in satisfaction of the mortgage, it is not necessary to issue an attachment. If the decree contains, as it ought to contain, a direction for sale of the mortgaged premises, the proceeding under such a decree by attachment is unnecessary as well as expensive and dilatory. The direction for sale in the decree is in itself sufficient authority for the sale. That direction is founded on the specific lien or charge on the mortgaged premises created by the contract of mortgage, and not on the execution clauses in the Codes of Civil Procedure.

[F., 15 C. 104 (105); L.B.R. (1893—1900) 139; U.B.R. (1897—1901) 356; R., 6 A. 341=A.W.N. (1884) 113; 17 A. 69 (72); 8 B. 481 (486); 14 B. 627 (631); 16 B. 608 (616); 20 B. 736 (741); 31 B. 73 (77)=8 Bom.L.R. 885 (889); 31 C. 511; 22 M. 494 (502); 55 M. 168 (176)=10 Ind. Cas. 424=21 M.L.J. 550=9 M.L.T. 423=(1911) 2 M.W.N. 315; 6 Bom.L.R. 1043 (1049); 15 C.P.L.R. 161; 2 L.B.R. 138 (139); **D.**, 16 A. 308 (313); 18 M. 405 (407).]

THE following question was submitted for the opinion of the High Court by H. Birdwood, Judge of the District Court of Surat, under s. 617 of Act X of 1877:—

"Whether a suit to establish a right, of the kind contemplated in s. 246 of Act VIII of 1859 and s. 283 of Act X of 1877, is a suit to obtain a declaratory decree where no consequential relief is prayed for, the plaint in which is properly stamped with a Rs. 10 Court Fee stamp, under sch. II, art. 17, cl. iii of Act VII of 1870."

The District Judge stated the case as follows:—

"The question has arisen in this Court on the hearing of appeal No. 99 of 1878 (*Dayachand Nemchand, original defendant* v. *Hemchand Dharamchand, deceased, his heir, his daughter, Bai Vijli, and Kasturchand Dharamchand, original plaintiffs*). In the original suit the plaintiffs sought to establish their right to attach and sell a house in execution of a decree held by them against one Narayan Ratanji. The defendant Dayachand Nemchand had preferred a claim to the house under s. 246 of Act VIII of 1859, and on his application the property was released from attachment.

"The plaint was at first filed in the Subordinate Court on a 10-Rs. stamp, but a 5-Rs. stamp was added, on the plaintiffs declaring that the property in dispute was worth Rs. 200. The appeal was admitted on a 10-Rs. stamp. The question of the sufficiency of the stamp, has been raised at the hearing by the respondents' pleader. Its decision by this Court would be final as between the [518] parties under s. 12, cl. i of Act VII of 1870, and it is one on which I entertain a reasonable doubt. Both parties are desirous that I should submit a statement of the facts of the case to the High Court.

"It is true that the decree in the present appeal would not be final if the Court were to decide to proceed with the appeal on the present stamp, or were to allow the full value to be paid if it considered Rs. 10 insufficient. But if, in the latter case, the appellant declined to pay more than Rs. 10, and the Court decided the case against him on that ground, its decree would be final. I have, therefore, dealt with the case under s. 617 of Act X of 1877.

"There are conflicting decisions of three of the High Courts in India on the point at issue. In the case of *Motichand* v. *Dadabhai*(1) the High

(1) 11 B. H. C. R. 186.

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Court held that the object of the plaintiff was to get rid of the attachment, and that the real subject-matter of the suit was the attachment placed by the defendant, and that, therefore, as consequential relief was sought, Court fees were payable on the amount of the attachment. There is a later ruling by the High Court in special appeal No. 136 to 1876 (*Sadashiv Yeshvant* v. *Atmaran Sakharam* (1) which is opposed to the ruling in Motichand's case, which is not referred in it. But the later ruling does not seem to have been reported. The Courts would, apparently, be bound by a reported, rather than by an unreported, case, especially when the reported case is not an old one. A ruling, similar to that in the reported case, has been made by the Calcutta High Court (22 C.W.R., 422). The Allahabad High Court held that a 10-Rs. stamp was sufficient (I. L. R., 1 All., 361). The facts in Motichand's case seem, however, to have been misunderstood by the Allahabad High Court; for it is stated in the report in I.L.R., 2 All., 63, that the 'plaint included a claim for possession.' But this, I beleive, was not the case. From the report in 11 Bom. H. C. Rep., 186, it seems to have been strictly a case under s. 246 of Act VIII of 1859. The plaintiff applied for a declaration of his rights to the house and of his right to the possession. In cross appeals Nos. 191 and 192 of 1875 in this District Court the late Acting Judge, Dr. Pollen, decided the point in favour of the [519] subject and, following the latest authorities, admitted the appeals on a 10-Rs. stamp. These cases were appealed to the High Court (Appeal No. 77 of 1879 from the appellate decree), and were decided in the High Court on 21st April, 1879. On a reference to the bill of costs in the High Court I find that the second appeal was admitted on a 10-Rs. stamp. The Subordinate Judges in the district have generally, I believe, followed Dr. Pollen's decision.

"The question arose lately before me on the hearing of original suit No. 17 of 1875, in which, as I had rejected the claims on another point, I did not think it necessary, though I considered the question and referred to the authorities, to record a formal decision on it. At all events, under the circumstances, I did not call upon the plaintiff to pay the full stamp which seemed to me to be required by the ruling in Motichand's case. The case will probably be appealed to the High Court. In it the plaintiff did not, as in Motichand's case, try to get rid of an attachment, but sought to restore an attachment. For the purposes of the point at issue, however, I do not think that the cases can be distinguished.

"When there are varying decisions in different High Courts, the Courts in this Presidency must follow the Bombay decisions, and though a recent decision of the Bombay High Court, showing that the older ruling has been practically abandoned, ought, apparently, to be preferred to an older one. I am not sure that this can be done when the older case is reported, and the latter is not. The printed judgments cannot be considered as reports of cases having the same force as the cases in the High Court Reports, or cases published under Act XVIII of 1875.

"My own opinion on the question is, that the Court Fees Act, being a law imposing a tax, should be construed strictly and in favour of the subject, and that where a plaint is one professedly to establish a right, and does not expressly pray for consequential relief, art. 17, cl. iii

(1) 4 B. 535, *infra*.

of sch. I of the Act should alone be applied to it. But I am in doubt whether I can act on this view of the law."

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JUDGMENT.

The following is the judgment of the Full Bench delivered by

WESTROPP, C.J.—This reference has been made to the High Court by the District Judge of Surat in an appeal (No. 19 of 1879) [520] pending before him in a suit instituted in the Court of the Subordinate Judge of Surat. When the case was first called on, we sent to the District Judge for a copy of the plaint, which has since been furnished to us.

From the plaint it appears that this suit was instituted by Hemchand Dharamchand (who we find from the reference, has since died, and is now represented by his daughter Bai Vijli, and Kasturchand Dharamchand, the present respondents) against Dayachand Nemchand, the appellant. The plaint states that in another suit brought by the same plaintiff, Hemchand Dharamchand, against Narayan Ratanji, upon a mortgage, the plaintiff obtained a decree in his favour. The plaint further states that the house was, on the plaintiff's application, attached with a view to recover the amount of the decree on the mortgage. It seems to be the inveterate practice of the Mofussil Courts of this Presidency to issue an attachment in enforcement of a decree establishing a mortgage, and directing a sale of the mortgaged premises, in satisfaction of the mortgage. If the decree contain, as it ought to contain, a direction for sale of the mortgaged premises, the proceeding under such a decree by attatchment would seem to be unnecessary, as well as expensive and dilatory (1). Neither in this Court at its original jurisdiction side, nor in the English or Irish Courts of Equity, is or has been any such procedure resorted to for the enforcement of a decree directing a sale. The direction for sale in the decree (see, for instance, the form No. 128 in sch. IV of Act X, 1877) is, in itself, sufficient authority for the sale. That direction is founded on the specific lien or charge on the mortgaged premises created by the contract of mortgage, and not on the execution clauses in the Codes of Civil Procedure. The plaint further stated that, on the application of the present defendant Dayachand Nemchand [made, it would seem, under s. 246 of the Civil Procedure Code (Act VIII of 1859)], the house was discharged from the attachment on the 11th of March 1874. The plaint, which originally bore a stamp of Rs. 10, was filed in the month of April following, and prayed "that a decree may be passed declaring the plaintiff entitled to sell the said mortgaged property (the house) and to recover his money by virtue of his said [521] right." A further stamp of Rs. 5 was subsequently added to the plaint on the plaintiffs declaring that the house was worth Rs. 200. The Subordinate Judge having, in this suit, made a decree in favour of the plaintiff, the defendant Dayachand Nemchand appealed to the District Judge. The memorandum of appeal bore a stamp of Rs. 10 only. The District Judge, while indicating his opinion that such a stamp is sufficient, has referred to this Court the question whether it is so.

That question depends upon the construction of the Court Fees Act (VII of 1870).

That Act does not contain any *express* provision as to the fees leviable in respect of suits brought (as the present suit has been) in pursuance of

(1) See also observations of Melvill, J., 4 B. 534, *infra*.

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the permission given in the concluding passage of s. 246 of Act VIII of 1859.

Two classes of suits might be brought in pursuance of that permission :

1. Suits to set aside an attachment where the intervenient, under s 246, has failed in his application, under that section, to have the attachment set aside.

2. Suits to restore an attachment where the intervenient, under s. 246, has succeeded in his application under that section by obtaining a discharge of the attachment.

Although there is, as already observed, no *express* provision in the Court Fees Act (VII of 1870) as to suits brought in pursuance of the permission given by s. 246 of Act VIII of 1859, there are, we think, in the Court Fees Act, two provisions, each of which is so phrased as to be wide enough to comprise both of the species of suits which may be brought pursuant to the permission given by s. 246 of Act VIII of 1859. The first, in point of order of those provisions, is s. 7, cl. iv, art. (*c*) which enacts that in suits " to obtain a declaratory decree or order where consequential relief is prayed " the amount of fee payable shall be computed " according to the amount at which the relief sought is valued in the plaint or memorandum of appeal" (1). It appears to us that a suit, to set aside or restore an attachment, [522] seeks not only a declaration of the plaintiff's right, but also substantial consequential relief in the setting aside or restoration of the attachment.

The second of the provisions, wide enough in its language to include suits brought in pursuance of the permission given by s. 246 of Act VIII of 1859, is contained in art. 17, cl. 1 of sch. II to the Court Fees Act (VII of 1870), which is, that a plaint or memorandum of appeal in a suit "to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent, or of any Revenue Court," shall be liable to a fee of Rs. 10. In the absence of any definition, in the Court Fees Act, of the term " summary decision or order," we should rather be disposed to regard it as a decision or order not made in a regular suit or appeal. Applications under s. 246 of Act VIII of 1859 being made by an intervenient who is a stranger to the suit in which the attachment has been laid on, do not constitute a suit, and are not conducted with the same regularity and plenitude of investigation as a suit is conducted. The reports show that various tests have been suggested by the Courts for determining what is a summary decision, and that it is a doubtful question. *Mancharam* v. *Ratilal* (2), *Ramdhan* v. *Rameswar* (3), *Maharaja Dhiraj* v. *Bacharam Hazra* (4). It has, indeed, been said that the meaning of the words "summary decision" is not "sufficiently well known to justify the use of them as a technical term in an Act of the Legislature without any definition" : *Ramdhan* v. *Rameswar* (3). Without positively binding ourselves to the proposition, that every decision or order not made in a regular suit or appeal is a summary decision or order, we are clearly of opinion that decisions, as to the removal or retention of attachments, pronounced under s. 246 of Act VIII of 1859, are summary decisions or orders. The circumstance that the Legislature expressly recognizes the right of the party defeated in the proceeding under that section to bring a regular suit to re-agitate the point decided, is a strong indication that the Legislature regarded the decision under that

(1) See commencement of s. 7 and conclusion of cl. iv of the same section.
(2) 6 B.H.C.R.A.C.J. 39.
(3) 2 B.L.R.A.J. 235.
(4) 5 B. L. R. F. B. 162.

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section as summary; but, in [523] saying this, we do not intend to imply that the legislative recognition of such a right is an indispensable element in fixing whether or not a decision is summary.

There being, then, two provisions in the Court Fees Act, each of which is sufficiently comprehensive to include suits brought pursuant to the permission given by s. 246 of Act VIII of 1859, it is our duty, inasmuch as the Court Fees Act is a fiscal enactment, to adopt that which generally would press least heavily on the subject. According to our experience, that would be art. 17, cl. 1, of sch, II of that Act, which fixes, on a plaint or memorandum of appeal in a suit to set aside a summary decision or order, an invariable fee of Rs. 10; and there have been several decisions of this Court which have held that to be the proper Court fee in suits brought under the permission given by s. 246 of Act VIII of 1859 and s. 283 of Act X of 1877.

Sometimes there are cases in which it would be more advantageous to the litigant to assess the fee under s. 7, cl. iv, art. (*c*), of the Court Fees Act, when the relief sought is valued very low, as, for instance, in a case decided by Mr. Justice Melvill on the 17th of November, 1879, where, if an *ad-valorem* fee under that provision had been admissible, the stamp on the memorandum of appeal would have been Rs. 2-4 only. In the vast majority of cases, however, the *ad-valorem* fee would be more than Rs. 10. Mr. Justice Melvill held Rs. 10 to be the proper fee in the case just mentioned (1).

We cannot pass over in silence the important enactment contained in s. 7, cl. viii, of the Court Fees Act, which provides that the amount of fee payable "in suits to set aside an attachment of land, or of an interest in land or revenue," shall be computed "according to the amount for which the land or interest was attached, provided that when such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest." Such latter computation is regulated by s. 7, cl. v. The present suit does not fall within s. 7, [524] cl. viii, for, first, it is a suit to restore and not to raise an attachment, and, secondly, that attachment was on a house and not upon land or an interest in land or revenue. That the term "land" in cl. viii, s. 7, does not include a house, is apparent from the commencement of cl. v and art. (*e*) of the same clause and section, and cl. vi—in all of which passages, houses, distinctly from lands, are specially mentioned when intended to be dealt with.

There is nought in the language of cl. viii of s. 7 to limit its scope to set aside any special kind of attachments on land. It is large enough to include suits, brought in pursuance of the permission given by s. 246 of Act VIII of 1859, to set aside attachments on land, as well as other suits for that purpose brought independently of that section. A person, whose property was wrongfully attached, was not compelled to resort, in the first instance, to an application under s. 246 of Act VIII of 1859. There was nothing to prevent him from commencing his litigation by a regular suit, if such were his pleasure. Again, there are suits to raise attachments on land where the plaintiff has never had any opportunity of resorting to an application under that section. Of these *The Collector of Thana* v. *Dadabhai Bomanji* (2),

(1) Second Appeal No. 400 of 1879 (*Purshotum Bacher* v. *Narayan Trimbak*). See note, p. 528, *infra*.

(2) 1 B. 352 (357).

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decided by Melvill and Kemball, JJ., is one of many instances which might be suggested. That was a suit to set aside a summary attachment laid on by a Collector under Bombay Act I of 1865. The High Court deemed cl. viii of s. 7 of the Court Fees Act to be the enactment applicable to such a case, and to some extent discussed that clause, but not with a view to its possible bearing upon suits to set aside attachments brought in pursuance of the permission accorded by s. 246 of Act VIII of 1859.

It may, on the one hand, be argued that cl. viii of s. 7 of the Court Fees Act includes all suits to set aside attachment, upon land, or, on the other hand, that it includes all such suits except where the result of setting aside the attachment would be to alter or set aside a summary decision or order of any Civil Court not established by Letters Patent, or of any Revenue Court, which latter construction would treat art. 17, cl. i [525] of sch. II, in so far as it can comprise suits to set aside attachments on land, as an exception to cl. viii of s. 7, and as excluding, from its scope, suits to set aside attachments which, upon an application under s. 246 of Act VIII of 1859, the Court has already refused to set aside. Which of these two constructions is correct, is a question not necessary for us now to decide, and upon which, in the present case, we do not give an opinion. It is remarkable that, although in cl. viii the Legislature expressly provided for suits to raise attachments on lands, it has not made any express provision for suits to restore attachments on land, which might fairly have been expected to be placed on the same level in respect of Court fees as suits to raise such attachments. Whether the mode of computation laid down in cl. viii, would be fair in either of those cases, is open to question. It is almost always difficult to say what the value of the attachment may turn out to be. Prior mortgages, charges, incumbrances, or attachments by other creditors, may, and often do, reduce the value of the attachment, not only below the amount for which it was laid on, and below the value of the land attached, but to nothing. The fairest mode of taxing a suit to raise or restore an attachment, would seem to be by a small fixed Court fee. Howsoever that may be, if the first of the two constructions, above given, be correct, the mode of computation prescribed by cl. viii would be applicable to all suits to set aside attachments on land, and should be carried into effect. If the second construction be the correct one, that mode of computation would be applicable only to suits to set aside attachments on land, where the setting aside of the attachment would not operate as a setting aside of a summary decision or order. If it be true that a suit to restore an attachment could only arise where the attachment had been discharged under s. 246 of Act VIII of 1859, or the similar section (283) of the Civil Procedure Code (X of 1877), and would, therefore, be a suit to set aside a summary decision, that circumstance, combined with the omission, in the Court Fees Act, to make any *express* provisions as to suits to restore attachments, may possibly lend a slight support to the argument that the second suggested construction of cl. viii of s. 7 of the Court Fees Act is the correct one, and that it treated suits to raise attachments, where the raising of the attachment would overturn a summary decision or order, on the same [526] principle as suits to restore attachments. That, however, is not a point for determination in this case.

When Acts are *in parimateria*, they may be treated as forming a code, and may be read together; but when this is not so, the construction, which has been put upon one, cannot be relied upon as a guide to

the construction of another: *Humble* v. *Mitchell* (1), *Dewhirst* v. *Fielden* (2); Maxwell on Statutes, 33. The Court Fees Act (VII of 1870) is essentially a fiscal enactment. The Limitation Acts have for their object the prevention of the litigation of stale claims. So far, then, from those Acts and the Court Fees Act being *in pari materia*, there is not any affinity between them; and, howsoever convenient it may be to place the same meaning on nearly similar words occurring in the Court Fees Act and the Limitation Acts (see Act IX of 1871, sch. II, art. 15; and Act XV of 1877, sch. II, art. 13), we do not feel ourselves at liberty to call the latter in aid of the construction of the former. The Court Fees Act appears to us to be as different in its object from the Limitation Acts as it (the Court Fees Act) is from enactments fixing the amounts which regulate jurisdiction (*ex. gr.*, the Bombay Civil Courts Act) presently to be again mentioned.

The learned District Judge, who has referred this case to us, seems to have regarded *Motichand Jaichand* v. *Dadabhai Pestonji* (3) as containing a decision on the Court Fees Act. An extra-judicial remark by myself, in relation to that Act, does occur in that case, and to that remark the District Judge has assigned too much importance. The remark would have been better unmade. In the concluding passages, however, of the judgment, it is expressly said that the decision was made "quite irrespectively of the Court Fees Act." That case was decided (and, as I think, rightly decided) on the Bombay Civil Courts Act (XIV of 1869), s. 26, which enacts that "in all suits, decided by a Subordinate Judge of the First Class in the exercise of his ordinary and special original jurisdiction, of which the amount or value of the subject-matter exceeds Rs. 5,000, the appeal from his decision shall be direct to the High Court." The plaintiff had been an unsuccessful intervenient, under s. 246 of Act VIII of 1859, **[527]** to raise an attachment on a house, and subsequently brought a suit for that purpose, in which, by his plaint, he prayed "that he might be entitled to the said property under his right of ownership, possession and enjoyment." My brother Kemball and I held that the test there of jurisdiction was the amount of the attachment and not the market value of the house. We regarded the attachment, not the house, as "the subject-matter" of the suit, and that, inasmuch as the attachment was for a less sum than Rs. 5,000, the appeal from the decision of the First Class Subordinate Judge did not lie direct to the High Court. The valuation of suits for the purpose of jurisdiction is perfectly distinct from their valuation for the fiscal purpose of Court fees. Therefore, Court Fees Acts, which are fiscal enactments, are not to be resorted to for construing enactments which fix the valuation of suits for the purpose of determining jurisdiction: *Baboo Lekraj Roy* v. *Kanhya Singh* (4); *Mohan Lal Sokul* v. *Bebee Doss* (5); *Bai Makhor* v. *Bulakhi Chaku* (6); *Jeebraj Singh* v. *Inderjeet Mahtoon* (7); *Nanhoon Singh* v. *Tofanal Singh* (8); and *Thiagaraja Mudali* v. *Ramanuja Charry* (9).

Motichand Jaichand v. *Dadabhai Pestonji* (3) was, apparently, not mentioned in the more recent case, *Ravloji Tamaji* v. *Dholapa Raghu* (10), in which (speaking for myself only) I am unable to concur. That case arose upon a claim under s. 229 of Act VIII of 1859. It seems to

(1) 11 Ad. & E. 205. (2) 7 M. & Gr. 182 (187). (3) B.H.C.R. 186.
(4) 1 I. A. 317. (5) 7 M. I. A. 428. (6) 1 B. 538.
(7) 12 B. L. R. 115, note = 18 W.R C.R. 109. (8) 12 B. L. R. 113.
(9) 6 M. H. C. R. 151 F. B. (10) 4 B. 123.

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me impossible to maintain that the subject-matter of that claim and the subject-matter of the suit in which it was made, were in anywise identical, or that the claim itself, made as it was by the intervenient Dholapa, who was a total stranger to the suit, could be regarded as a continuation of a suit in which there had been a final decree before his claim (subsequently, in obedience to s. 229, converted into a suit) was made.

That the Court Fees Act (VII of 1870) might be advantageously amended with a view to the attainment of a higher degree of perspicuity than it now possesses, is, we think, evident from the [528] observations in this case as well as those in *Manohar Ganesh* v. *Bawa Ramchandra* (1).

Our reply to the District Judge is, for the reasons above given, that the plaint in this case being a suit, under s. 246 of Act VIII of 1859, to restore an attachment upon a house, which attachment had been removed at the instance of an intervenient under the same section, is sufficiently stamped with a Rs. 10 stamp and that the same ruling holds good as to a memorandum of appeal in such a suit.

Melvill, J., and F.D. Melvill, J., concurred in the above reply to the District Judge, but did not express any opinion on the case of *Ravloji Tamaji* v. *Dholapa Raghu* (2).

4 B. 528-N.

NOTE.—In *Pursholum Bhacher* v. *Narayan Trimbak* above referred to (Second Appeal No. 400 of 1879) the question arose, on the presentation of the memorandum of appeal in the High Court on a stamp of Rs. 2-4 whether it was sufficiently stamped, or whether the proper stamp for it was Rs. 10. Mr. A.C. Watt, Registrar and *ex-officio* Taxing Officer of the Court, submitted the question to the Chief Justice, under s. 5 of Act VII of 1870, with the following remarks:—

"This suit was brought by plaintiff, under the latter portion of s. 246 of the Code of Civil Procedure of 1895, to establish his right to a house which he states was purchased by him for Rs. 30, the defendant having attached the said house in execution of a decree got by him against plaintiff's vendor. In the Court of first instance, as also in the lower Appellate Court, in both of which plaintiff succeeded, the plaint and appeal were stamped with a Court fee label of Rs. 10. The defendant, represented by Mr. Nagindas, now presents a second appeal, to this Court, and has affixed Rs. 2-4-0 of Court fee stamps to his second appeal, valuing it, as he explains, on the basis of the plaintiff's document of sale, which appears to have been for Rs. 30. The decisions of the lower Courts on the question of Court fee are not in any way binding on the taxing officer of this Court, and although there was nothing to show on what ground a Rs. 10 Court fee stamp was affixed in the lower Courts, still the inference is that the lower Court looked upon the suit as one to set aside a summary decision or order of a Civil Court, and, as such, one to which para. 1, art. 17, sch. II of Act VII of 1870 applied. The question is whether this view is correct, because in s. 246 the suit which the unsuccessful party is required to bring, is one to establish his right. The head shristadar has referred me to a High Court decision, *Sadashiv Yeshvant* v. *Atmaram Sakharam* (3), which case I have sent for and seen. That decision was that in a suit brought under s. 246 of Act VIII of 1859, Rs. 10 stamp was sufficient, though the value of the property was [529] very much higher than such a stamp would cover; and it was also held that the suit was to be regarded as one to set aside a summary decision. This decision would appear to apply in principle; but I am not quite sure, that because a Rs. 10 stamp is sufficient, when the value of the property is more than such a stamp will cover (*viz.*, Rs. 130), that therefore there must be a Rs. 10 stamp when the value is much less than it will cover, as in the present case (*viz.*, Rs. 30). The judgment at page 428 of the Printed Judgments of 1879 seems to affirm the decision of 1876, quoted above, as to the nature of a suit of this kind.

"As the question is of frequent occurrence and of general importance, and as there is not any uniform practice in this office, I think it proper to refer the matter to the final decision of the Honourable the Chief Justice under s. 5 of the Court Fees Act."

(1) 2 B. 219. (2) 4 B. 123. (3) 4 B. 535, *infra*.

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4 B. 515 (F.B.).

The Chief Justice referred the question to Mr. Justice M. Melvill, who made the following order on the 17th November 1879 :—

M. MELVILL, J.—This Court has already held that a suit brought by a party who has failed in a miscellaneous proceeding under s. 246 of Act VIII of 1859, or the corresponding section of the new Code, is a suit to set aside a summary decision of a Civil Court. It is on this ground that we have held that, after or before the repeal of the last eleven words of s. 246 of Act VIII of 1859, such a suit must be brought within one year. The construction of the Court Fees Act upon this point must follow that which we have put on the recent Limitation Acts. The memorandum of an appeal must bear a stamp of Rs. 10 under art. 17, sch. II of the Court Fees Act. [This case is also referred to in 4 B. 515 (F.B.)].

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4 B. 529 (F.B.).

FULL BENCH—APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice F. D. Melvill.

NARAYANRAV DAMODAR DABHOLKAR AND BROTHER (*Original Plaintiffs*), *Appellants v.* BALKRISHNA MAHADEV GADRE (*Original Defendant*), *Respondent.** [23rd June, 1880.]

Suit for a declaratory decree—Consequential relief—The Specific Relief Act (I of 1877), s. 42—Court Fees Act (VII of 1870). s. 7, cl. viii.

The defendant obtained a decree against D, father of the plaintiffs, for satisfaction of his debt by the sale of a moiety of a village mortgaged to him by D. In execution of it he attached the mortgaged property, the attachment being made under s. 274 of the Civil Procedure Code (Act X of 1877), by an order prohibiting D from transferring or charging the property in any way, and all persons from receiving it from him by [530] purchase, gift, or otherwise. The plaintiffs thereupon applied for the removal of the attachment but their application was rejected. They then sued for a declaration of their right to two-thirds of the property. The District Judge, who tried the suit rejected it on the ground that it was barred by s. 42 of the Specific Relief Act (I of 1877), because the plaintiffs might have sought further relief than a mere declaration of title and omitted to do so. He was of opinion that the attachment constituted a dispossession and that the plaintiffs might have asked to be replaced in possession or, at any rate, for the removal of the attachment.

Held by the High Court on appeal that the plaint was not open to objection on the ground that it only asked for a declaratory decree without any consequential relief.

Held that the prohibitory order to D. did not constitute a dispossession of D., and still less of the plaintiffs, and that they could not have properly asked for removal of the attachment by a cancellation of the prohibitory order to D., so long as they admitted that D. had an interest in the attached property.

Held, also, that the plaintiffs could not have properly asked for any consequential relief in their suit, but that when they instituted it, they were entitled and indeed bound to ask for a declaration of their right, if only to prevent a purchaser at the sale under the defendant's decree against D., from afterwards alleging that he had purchased without notice of the plaintiffs' claim.

[F., 4 M. 131; L.B.R. (1893—1900) 139; Appl., 7 Bom. L. R. 267 (272); R., 12 A. 129=1890 A.W.N. 39 (F.B.); 8 B. 481 (486); 16 B. 608 (616).]

THIS was an appeal from the decision of W. Wedderburn, Judge of the District Court of Ahmednagar, in original suit No. 1 of 1879.

Damodar, father of the plaintiffs Narayan and Gopal, and *jaghirdar* of the village of Akolner, mortgaged half of his *jahgir* village to the defendant Balkrishna. Balkrishna brought a suit upon this mortgage, and

* Appeal No. 30 of 1879.