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the temples there specified. The Magistrate observes as follows:— "Further in acknowledging their incapacity to grant a perpetual injunction, the Civil Courts have shown that they [28] are unable to protect Sato in the enjoyment of his rights." In respect to his observation it is only necessary to point out the protection generally afforded by the substantive criminal law. As regards the duty of the Magistrate when he apprehends that there will be a breach of the peace, it is sufficient to mention the provisions of chap. 8 of the Code of Criminal Procedure as to taking security. The subject was considered in *Sundram Chetty* v. *the Queen* (1) where the limits of magisterial interference with rights are discussed. The learned Chief Justice says (pp. 220 and 221): "It needs no argument to prove that the authority of the Magistrate should be exerted in the defence of rights rather than in their suspension; in the repression of illegal rather than in interference with lawful acts. If the Magistrate is satisfied that the exercise of a right is likely to create a riot, he can hardly be ignorant of the persons from whom disturbance is to be apprehended, and it is his duty to take from them security to keep the peace." We, therefore, quash the order as made without jurisdiction.

Order quashed.

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APPELLATE CIVIL.

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

SAKHARAMSHET AND OTHERS (*Original Plaintiffs*), *Appellants* v. AMTHA DEVJI GANDHI AND OTHERS (*Original Defendants*) *Respondents.** [21st March, 1889.]

Mortgage—Redemption—Vismajor—Asmani sultani, meaning of the words.

A mortgage-deed stipulated that in the event of the mortgaged house being destroyed "by *asmani sultani*", (*i.e.*, evils from the skies or the king), the mortgagor should rebuild it, and if he did not do so, and if the mortgagee rebuilt it, he (the mortgagor) would pay the cost of rebuilding with interest in addition to the mortgage debt. The house was destroyed by a fire which originated in another part of the village, and the mortgagor failing to rebuild the house, the mortgagee rebuilt it. The mortgagor brought the suit for redemption.

Held, that the repayment of the costs of rebuilding the house was a condition precedent to redemption. The destruction of the house was in the nature of a calamity from heaven within the meaning of the term *asmani*.

[29] THIS was a second appeal from a decision of R. Courtenay, Assistant Judge of Ratnagiri.

The plaintiffs sued to redeem a house, alleged to have been mortgaged for Rs. 501 by their ancestor Balshet in 1828 to Devji, the father of the defendant. The material portion of the mortgage-bond was as follows:—

"In the event of the house being destroyed by *asmani sultani* (evils from the skies or the king), you (mortgagee) are not to be answerable. I (mortgagor) will rebuild the house myself. In the event of my failing, I will pay interest (on the mortgage debt) at 12 annas *per cent. per* month;

* Second Appeal No. 521 of 1886.

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if I fail to rebuild and should you rebuild the house, I will pay the costs that may be incurred, with interest at 12 annas *per cent. per* month."

In 1834 the house was burnt by a fire which had originated in the village, and spread to the place where the house was situated. The plaintiffs' ancestor having failed to rebuild the house, defendants' father rebuilt it at the alleged cost of Rs. 1,013-6-6.

In 1883 the plaintiffs brought the present suit to redeem the house.

The Court of first instance held the house redeemable by the plaintiffs on payment of Rs. 501 within three months from the date of its decree.

On appeal by the defendants to the Assistant Judge, he held that the plaintiffs could redeem the house on payment of Rs. 2,501, he having allowed costs of rebuilding and repairs with interest.

From this decision the plaintiffs preferred a second appeal to the High Court.

Daji Abaji Khare, for the plaintiffs (appellants) :—The lower appellate Court was wrong in awarding costs of rebuilding the house. It was a house of small value when it was mortgaged. The defendants should not have spent such a large sum in rebuilding it. A mortgagee is not allowed to so encumber the property as to make it impossible for the mortgagor to redeem.

Mahadev Chimnaji Apte, for the defendants (respondents):—Having regard to the language of the mortgage-bond the defendants **[30]** are entitled to the costs of rebuilding the house. The fire was an act of God, and clearly within the meaning of the words *asmani sultani* in the mortgage-deed. These words are identical in meaning with *afat samavi*, which have been held to apply to a loss by an accidental fire—*Mancharsha Ashpandiarji* v. *Kamrunisā Begam* (1). The defendants, therefore, were rightly allowed the costs of rebuilding by the lower appellate Court.

JUDGMENT.

SARGENT, C. J.—It is objected that the lower appeal Court was wrong in adding the cost of the rebuilding by the mortgagee to the mortgage-debt. The mortgage-deed itself provides for the mortgagee rebuilding the house if its destruction be due to '*asmane* or *sultani*' in the event of the mortgagor failing to rebuild it, and upon the proper construction of the deed we think that the repayment of the amount so expended was condition precedent of redemption. The evidence shows that the fire originated in an other part of the village, and spreading ultimately destroyed the house in question. We are inclined to think that the destruction of the house under such circumstances was in the nature of a calamity from heaven within the meaning of the term '*asmani*'. In *Mancharsha Ashpandiarji* v. *Kamrunisa Begam* (1), the expression '*afat samavi*' in a Persian mortgage-deed, which is admittedly equivalent to the term '*asmani*' was held to apply to a loss sustained by accidental fire and the falling down of another part of the house. But in any case the cost of rebuilding the house would on general principles as decided in that case be properly allowed to the mortgagee in taking the account. The plaintiff resisted the claim only on the ground that he had rebuilt the house, and cannot now be heard to complain that the defendant has given no evidence to show that the work was done providently. We must, therefore, confirm the decree with costs.

Decree confirmed.

(1) 5 B. H. C. R. A. C. J. 109.